89-344

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1989

JAMES M. WOODWARD,

Petitioner,

V.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DANIEL M. SCHEMBER
GAFFNEY, SCHEMBER & KETE, P.C.
1120 G Street, N.W.
Washington, D.C. 20005
202/393-5444

Counsel of Record for Petitioner

JOEL PAUL
Assistant Professor of Law
Washington College of Law
The American University

Of Counsel

QUESTIONS PRESENTED

1. Did the Court of Appeals presume improperly that Woodward committed homosexual acts—a fact not in evidence—where he admitted only gay orientation and nonsexual association, and his denial of acts was undisputed?

2. Was it improper for the Court of Appeals to have decided constitutional questions pretermitted below, without any articulation by the Navy of interests harmed by Woodward's gay orientation, nondisruptive speech, and nonsexual association?

3. If constitutional questions are reached, does the First Amendment preclude Woodward's release from active duty merely for stating his gay orientation and associating nonsexually with gay men?

4. Did Woodward's release for being gay, absent any evidence of homosexual conduct, violate equal protection?

5. Was Woodward's release arbitrary and capricious, since Navy policy at the time allowed retention of some homosexual officers, including officers who had committed homosexual acts, but the Navy has never articulated the retention criteria, or their application to him?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner James M. Woodward respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on March 29, 1989.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal

Circuit is reported at 871 F.2d 1068 (Fed. Cir. 1989) and appears in the appendix at 1a. The opinion of the United States Claims Court is unreported; it appears at 96a.

The first opinion of the United States District Court for the District of Columbia is reported at 451 F. Supp. 346 (D.D.C. 1978). It appears at 45a. On appeal from this decision, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case in an unreported order appearing at 58a.

On remand, the District Court vacated its 1978 opinion and order in an opinion and order reported unofficially at 25 Fair Emp. Prac. Cas. (BNA) 695 (D.D.C. 1981). They appear at 60a and 74a, respectively. Subsequently, the District Court granted the Navy summary judgment in an unreported memorandum order appearing at 76a. Reconsideration was denied in an unreported memorandum order appearing at 83a.

On the second appeal, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case in an unreported order and memorandum appearing at 90a and 92a, respectively. The case then was transferred to the Claims Court.

JURISDICTION

The judgment sought to be reviewed is dated March 29, 1989, and was entered that day. Rehearing was denied May 2, 1989. By order dated July 21, 1989, Mr. Justice White extended until August 30, 1989, the time for filing a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech . . . or the right . . . peaceably to assemble.

U.S. Const. amend. V (excerpt)

No person shall . . . be deprived of life, liberty, or property, without due process of law.

5. U.S.C. §706 (excerpt)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity.

10 U.S.C. §681(a)

Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

10 U.S.C. §1552(a) (excerpt)

The Secretary of a military department . . . acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

STATEMENT OF THE CASE

In 1972 petitioner James M. Woodward enlisted for six years in the Naval Flight Officer Candidate Program. He answered

"Yes" the following question on the Navy enlistment form: "Are you attracted sexually or do you desire any sexual activity with persons of the same sex as yourself?" To the question "Have you ever engaged in sexual activity with another person who is the same sex as yourself?" he answered "No." (PRMSJ App. 12.)[1] Petitioner was trained and commissioned. He commenced operational assignments in which he earned satisfactory evaluations from his superiors.

In the early Fall of 1974 Ensign Woodward was seen sitting in the Subic Bay Officer's Club with an enlisted man who was undergoing administrative discharge for homosexuality. Petitioner then met with his commanding officer, Commander Moore. Petitioner acknowledged his homosexual tendencies and that he sought the company of gay servicemembers. App. 3a.

Commander Moore wrote to the Chief of Naval Personnel, recommending Ensign Woodward be discharged for professing homosexual tendencies. Ensign Woodward then wrote the Chief of Naval Personnel, stating:

> I am, and have been, since I became sexually aware, primarily homosexually oriented.... I do, and will continue to, associate with other homosexuals.
>
> * * *
>
> I am well aware of the problems of social acceptance and special problems of leadership with which I will be confronted as my associates become aware of my homosexuality.
>
> * * *
>
> For the good of both the Navy and myself, I respect-

1 The reference is to the Appendix to Plaintiff's Renewed Motion for Summary Judgment, filed in the Claims Court July 15, 1985.

> fully request the chance to contribute to the defense of the United States as an honest, open, "gay" officer. I recommend that the matter of my homosexuality be dropped as a matter of official concern.

App. 4a.

Commander Moore's recommendation was deemed vulnerable on legal grounds for reasons the Navy at this time cannot recall. (PRMSJ App. 53-54.) Instead of discharging Woodward, the Navy terminated his assignment at sea and released him from active duty. As the United States District Court for the District of Columbia found, "Woodward's service pay was stopped and his chances of advancement were effectively ended." App. 69a.

Petitioner sought reinstatement to active duty from the Board for Correction of Naval Records (BCNR). The Board requested an advisory opinion from the Chief of Naval Personnel, who wrote "[t]he provisions of 10 U.S.C. §681(a) do not require the Secretary to provide a reason for release of a Reserve Officer to inactive duty and none has been assigned." (PRMSJ App. 22.) The Chief of Naval Personnel went further, however, stating "[i]f . . . a reason were required for his release to inactive duty," the meeting in the officer's club "could be characterized as a public flaunting of his beliefs" and would constitute a "sufficient basis" for the decision. (PRMSJ App. 23.) BCNR denied relief, saying only "the Board determined that insufficient evidence has been presented to indicate probable material error or injustice." App. 43a.

Petitioner then filed suit in the United States District Court for the District of Columbia.[2] The District Court rejected petitioner's nonconstitutional and First and Fifth Amendment claims, but the District of Columbia Circuit, over the Navy's opposi-

2 The District Court later was held to lack jurisdiction, but it had power to transfer the case to the Claims Court, 28 U.S.C. §1631, which had jurisdiction under 28 U.S.C. §1491(a)(1).

tion, remanded the case for reconsideration in light of *Berg v. Claytor,* 591 F.2d 849 (D.C. Cir. 1978). In *Berg* the Navy conceded that its own policy allowed continuation on active duty of even some officers who had committed homosexual acts. The court held the Navy had failed to articulate the retention criteria or to explain their application to Berg.

On remand the District Court vacated its previous final order and held, in light of *Berg*, that the Navy had denied Ensign Woodward the benefit of its retention policy without explaining the reasons therefor. The District Court ordered the Navy to

> provide the Court with a statement of reasons for plaintiff's release from active duty, including an explanation of the application of the Navy's retention policy regarding homosexuals to this plaintiff.

App. 74a-75a.

In response to this order, however, the Navy declined to explain its retention policy or its application to Ensign Woodward. Instead, the Navy submitted declarations saying (1) in the Fall of 1974 the Navy was undergoing a reduction in force involving release of Reserve officers; (2) after Commander Moore's discharge recommendation was rejected, Ensign Woodward was deemed available for reassignment or release from active duty and his record was sent to a reviewing office; (3) although Ensign Woodward was "usually rated above average," his record "was considered far from outstanding"; (4) Ensign Woodward's sexual preference caused the reviewing office to lower the evaluation of his record even further; (5) the reviewing office, expressly citing homosexual tendencies as a reason, recommended Ensign Woodward's release rather than reassignment; and (6) this recommendation was accepted. (PRMSJ App. 45-54.)

Relying on these declarations the Navy claimed a basis for Ensign Woodward's release "independent" of his sexual preference. The District Court granted the Navy summary judgment,

but did not accept the Navy's "independent basis" theory. Instead, the court held that, in light of Ensign Woodward's above average but "far from outstanding" fitness reports, his "qualifications and record were not of such unusual strength to merit retaining [him] inspite of his acknowledged homosexual tendencies." App. 82a.

On appeal to the District of Columbia Circuit, the Navy questioned the District Court's jurisdiction and the Court of Appeals remanded. The case then was transferred to the Claims Court, where discovery was granted.

Discovery revealed (1) contrary to the Navy's reduction in force argument, Naval Flight Officers, petitioner's category, underwent a net increase in the year Ensign Woodward was released, as was the case in the subsequent and preceding years (PRMSJ App. 82-84); (2) none of the standard criteria for sending an officer's record to the reviewing office applied to Ensign Woodward, and the records reviewed by the office normally were those of lieutenants and lieutenants j.g., not ensigns; (3) Ensign Woodward's record was sent to the office because he acknowledged homosexual tendencies; and (4) he was the only ensign in his category released from active duty that year. (PRMSJ App. 60-61, 71, 82-84, 91.)

On this record, the Claims Court assumed without deciding that the Navy's failure to grant petitioner consideration under its homosexual retention policy was arbitrary and capricious, and that release of a Reserve officer for acknowledging homosexual feelings and nonsexual association violates the Constitution, but the court accepted the Navy's "independent basis" theory, reasoning:

> A Navy Ensign with a record similar to plaintiff's would have been released if his file had reached the reviewing office at the same time Woodward's file did.

App. 109a.

On appeal to the Federal Circuit, petitioner argued his file was sent for review only because he verbally acknowledged homosexual feelings, and that the Navy failed to meet its burden under *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), of proving his file would have been sent for review had this acknowledgement not occurred. Since Woodward was the only ensign in his category released, no evidence supported the Navy's force reduction argument, or its argument that his average performance record by itself would have caused his release. Petitioner asked the Federal Circuit to reverse the Claims Court's "independent basis" ruling and remand for consideration of the nonconstitutional and constitutional claims pretermitted by that court.

The Federal Circuit rejected the Claims Court's "independent basis" holding. App. 23a-25a. Instead of remanding the case, however, the court decided the merits itself. The court did so in the absence of any statement by the Navy (1) articulating the criteria for retention of homosexuals under the Navy's policy in force at the time of Ensign Woodward's release; (2) explaining the application of the retention criteria to Ensign Woodward; or (3) identifying the legitimate Navy interests served by purging gay-oriented servicemembers who acknowledge their feelings in nondisruptive communication, or associate nonsexually with homosexuals.

In analyzing the merits of Woodward's constitutional claims, the Federal Circuit asserted that it was not presented with a "situation where there is action based *solely* on 'status as a person with a homosexual orientation,' " Ap. 26a, n.6 (emphasis in original), quoting *benShalom v. Marsh*, ____ *F. Supp.* ____, No. 88-c-468, slip op. at 2 (E.D. Wis. January 10, 1989). Rather, because Ensign Woodward acknowledged homosexual feelings and nonsexual association with homosexuals and failed to "claim. . .he is celibate," *id.*, the court removed the case from

the category involving "only homosexual tendencies." Instead, the court placed Ensign Woodward in the class, "homosexuals," defined as persons who engage in criminal conduct. The court did so despite the absence of any evidence or Navy argument that he committed, attempted, or intended any homosexual act, and despite his explicit, undisputed denial of homosexual acts on his enlistment form. App. 36a-37a.

From this premise, the court then dismissed Woodward's equal protection claim, holding that, after *Bowers v. Hardwick*, 478 U.S. 186 (1986), which rejected a privacy challenge to a sodomy conviction, "it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm." App. 36a. The court also held that Ensign Woodward's verbal acknowledgement of his feelings was "not entitled to First Amendment protection," because his "statements were made for personal reasons and not to inform the public of matters of general concern.' " App. 11a, n.2, quoting *Fiorillo v. United States Dep't of Justice*, 795 F.2d 1544, 1550 (Fed. Cir. 1986). The court did not discuss First Amendment protection of Ensign Woodward's nonsexual association with homosexuals.

Finally, the court rejected petitioner's nonconstitutional claim. App. 13a-14a, n.3. The court said Ensign Woodward "was not discharged for homosexuality," but released, rather than reassigned, "because of his mediocre record. . . *and* his homosexuality." App. 13a, n.3. (Emphasis in original.) The court concluded "there is no inconsistency between Woodward's treatment and the Navy's practice of considering some homosexuals for retention. *Id.*[3]

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3 The court, of course, could not discuss the Navy's retention criteria, since they remain unrevealed. Thus, the court could not determine whether under the policy performance evaluation was relevant, let alone dispositive, or whether the policy considered other factors such as (1) homosexual orientation only, (2) evidence of acts, (3) aggravation or mitigation of acts depending on identity of partner (superior, subordinate, neither), or (4) occurrence of acts of duty versus off duty, etc.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL CIRCUIT IMPROPERLY PRESUMED CRIMINAL ACTS BY ENSIGN WOODWARD SOLELY FROM HIS ACKNOWLEDGEMENT OF GAY ORIENTATION AND NONSEXUAL ASSOCIATION.

In addressing the constitutional claims of homosexual servicemembers, the First, Seventh, Ninth and Tenth Circuits all have distinguished gay orientation, or related speech and association, from criminal homosexual acts. *Ben-Shalom v. Marsh,* ____ F.2d ____, No. 88-2771 slip. op. at 10-11 (7th Cir., August 7, 1989) (new Army regulation valid, prior language broadly mandating discharge of those with homosexual tendencies or interest having been deleted); *Watkins v. U.S. Army*, 875 F.2d 699, 711, n.18 (9th Cir. 1989) (en banc) (Army estopped from discharging servicemember for any future acknowledgement of homosexuality, but not for any future illegal homosexual act); *see also* 875 F.2d at 712-716, 725 (concurring opinion) (Army regulations discriminate on the basis of sexual orientation, in violation of equal protection component of Fifth Amendment); 875 F.2d at 731 (concurring opinion) (same); *Matthews v. Marsh,* 755 F.2d 182, 184 (1st Cir. 1985) (remanding for consideration of previously unavailable evidence of homosexual acts, but acknowledging seriousness of First Amendment claim accepted by district court prior to evidence's availability); *Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984) (plaintiff discharged for falsely denying homosexual activity on enlistment application, not "for advocating homosexuality or merely associating with homosexuals").

The District of Columbia and Fifth Circuits have emphasized the same distinction in other contexts. *Padula v. Webster,* 833 F.2d 97, 102 (D.C. Cir. 1987) (persons who engage in homosexual conduct not a suspect or quasi-suspect class; classification

at issue "focuses only on homosexual conduct, not homosexual status"); *Doe v. Casey,* 796 F.2d 1508, 1522 (D.C. Cir. 1986) (noting unresolved "difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*") (emphasis in original); *aff'd in part, rev'd in part sub nom Webster v. Doe,* 486 U.S. ____, 100 L.Ed.2d 632 (1988); *Baker v. Wade,* 774 F.2d 1285, 1287 (5th Cir. 1985) (en banc) (denying rehearing, noting "statute [prohibiting homosexual sodomy] is directed at certain conduct, not at a class of people").

The Federal Circuit's opinion in this case also acknowledged the distinction, App. 26a, n.6, but declined to invoke it. Instead, the court presumed Ensign Woodward was in the class, "homosexuals," defined by the court as those who commit, or have committed, criminal homosexual acts. App. 36a-37a. It did so despite his denial of homosexual acts on his enlistment form; absent any evidence of homosexual acts committed, attempted, or even intended by him; and solely because he acknowledged his sexual orientation and nonsexual association with homosexuals, and failed to "claim" celibacy.

No other circuit has presumed a servicemember guilty of criminal homosexual acts merely from her or his acknowledgement of homosexual tendencies and nonsexual association.[4] Nor

4 The Seventh Circuit held Ben-Shalom's admission of "desire" to engage in homosexual acts "compelling evidence" she "has in the past and is likely to again engage in such conduct," slip op. at 17-18, but the court distinguished "desire" from mere "tendencies" or "interest." *Id.* at 10. The court also said Ben-Shalom was free to associate with lesbians. *Id.* Here, the record shows the Navy released Ensign Woodward merely for acknowledging homosexual tendencies and associating with a gay man. His affirmative answer on the enlistment form was to a question posed in the disjunctive: are you attracted sexually to *or* do you desire sexual activity with a person of your sex. No inference of past homosexual conduct can be drawn from this answer, moreover, since it was accompanied by explicit denial of any past homosexual acts. Finally, in his letter to the Chief of Naval Personnel, Ensign Woodward said that he had been primarily homosexually oriented since he had become sexually aware, indicating a substantial history of *not* acting on his homosexual tendencies.

has any other circuit required a "claim of celibacy" as a precondition to relief from sexual orientation discrimination.

The Federal Circuit's decision violates well-established cannons of appellate review. It is a cardinal principle of federal procedure that a court of appeals must decide a case based on the facts and the record before it. An appellate court is not at liberty to presume the existence of facts not in the record, especially where, as here, the facts are so crucial to the disposition of the case.

The Federal Circuit's analysis is also contrary to *Mt. Healthy City Board of Education v. Doyle, supra.* Petitioner established the reason for his release was his professing gay orientation and associating nonsexually. Therefore, it was the Navy's burden to prove, if it so claimed, that Ensign Woodward would have been released for an independent reason, i.e., for homosexual acts. *Id.* The Navy, however, made no such claim, and petitioner was under no obligation to anticipate and disprove, by claim of celibacy, a defense never raised. By equating Ensign Woodward with persons guilty of criminal acts, and on that premise deeming his equal protection claim foreclosed by *Hardwick,* the court committed fundamental error.

This Court should issue the writ, reverse the Federal Circuit, and remand with instructions to address Woodward's claim of discrimination based on gay orientation, acknowledgement thereof, and nonsexual association. We show below, moreover, that the first step should be remand to the Claims Court for proof by the Navy of the interests served by its sexual orientation discrimination, and its intolerance of Ensign Woodward's nondisruptive speech and nonsexual association.

II.

THE FEDERAL CIRCUIT PREMATURELY DECIDED THE EQUAL PROTECTION QUESTION, WITHOUT EVIDENCE OF ANY INTERESTS SERVED BY THE NAVY'S DISCRIMINATION.

In *Watkins, Matthews,* and *Ben-Shalom* the Army articulated, with evidence, the interests served by its discrimination, or its intolerance of speech and association.[5] In *Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980), the Navy submitted evidence of interests served by discharge of servicemembers for homosexuals acts.

The Navy submitted no such evidence here.[6] It asserted its "independent basis" defense instead. When the Federal Circuit rejected the defense, the court should have remanded, not decided, the questions pretermitted by the Claims Court.

Proper adjudication of equal protection claims requires, at the very least, government articulation of the interests served by

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5 In *Ben-Shalom* the court held that where "compelling evidence" establishes both past homosexual acts and likelihood of future acts, the Army need not take the risk that a servicemember will be unable to resist her desire for homosexual activity. In the present case no similar "compelling evidence" is present. *See* n.4, *supra.* Further, the Navy never has articulated an interest in avoiding risk of future acts, as a basis for releasing those who merely have homosexual tendencies or who associate nonsexually. Navy policy applicable at the time allowed retention of some officers who had committed homosexual acts. Further, if the Navy were to assert on remand "risk of acts" as the reason for its release of Ensign Woodward, a serious question would be presented whether sufficient evidence establishes the risk. Such an assertion, moreover, would have all the appearances of an impermissible post hoc rationalization, rather than a bona fide contemporaneous reason. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 419 (1971).

6 Indeed, the government's brief in the Federal Circuit contains no mention at all of petitioner's equal protection claim.

discrimination. *See, McGinnis v. Royster,* 410 U.S. 263, 270 (1972). In most cases, a court may presume the validity of government action, *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) (classification based on mental retardation), but where courts examine criteria deserving suspicion, or affecting important interests, no presumptions apply. The government bears the burden of justification, as well as articulation. *Kirchberg v. Fenstra,* 450 U.S. 455, 460, n.7 (1981) (sex discrimination).

In military cases it is particularly important for the government to articulate the interests served by its action, for military judgments on matters requiring military expertise are entitled to deference. *Rostker v. Goldberg,* 453 U.S. 57, 65-67 (1981). A court cannot defer to the unknown and, prior to according deference, must determine whether military reasoning in fact flows from military expertise.

Discrimination against gay-oriented men certainly appears less rational than special treatment of the mentally retarded, *see Cleburne,* and, in the military context, less rational than discrimination on the basis of sex. *See Rostker.* Unlike gender discrimination, here the Navy's discrimination cannot be defended on the basis of differences in physical capacity. Indeed, the concurring opinion in *Watkins* argues for strict scrutiny of sexual orientation discrimination by the military. 875 F.2d 724-728.

Even if strict scrutiny is not applied,[7] the Navy's articulated reasons must be examined to determine their entitlement to deference, and to ensure they do not merely reflect government sanction of private prejudice. *Cleburne,* 473 U.S. 448; *see also, Watkins,* 875 F.2d 728-729 (concurring opinion; Army's bases for sexual orientation discrimination "illegitimately cater to private biases").

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7 The Federal Circuit's opinion, at App. 38a, incorrectly asserted that petitioner failed to argue his equal protection claim under the rational basis standard. *See* petitioner's reply brief in the Federal Circuit, at 14-15.

The Federal Circuit improperly decided Woodward's equal protection claim in a vacuum, absent any evidence of interests served by the Navy's action.

III.

THIS SAME ERROR APPLIES TO PETITIONER'S FIRST AMENDMENT CLAIMS; ALSO, THE COURT OF APPEALS ERRED IN HOLDING HIS STATEMENTS UNPROTECTED, AND NOT ON A MATTER OF PUBLIC CONCERN.

The First Amendment rights of government employees and servicemembers are determined by balancing their interests in particular expression or association against any government interests adversely affected. *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Connick v. Myers*, 461 U.S. 138, 140 (1983). Essential to this undertaking is articulation by the government of the interests deemed harmed by the speech or association it has punished.

This the Navy never did. Its brief below asserted simply that Ensign Woodward's sitting in the officer's club with a homosexual enlisted man and his acknowledgement of homosexual feelings were not protected by the First Amendment, Govt. Fed. Cir. Br. at 12, as if the conduct in the club were not association and the acknowledgement, not speech.

As previously noted, the Federal Circuit never addressed the association claim, but as to the speech claim it accepted the government's argument. Citing *Connick*, it held Ensign Woodward's statements "not entitled to First Amendment protection" because they were made "for personal reasons, not to inform the public of matters of general concern." App. 11a, n.2, *quoting Fiorillo*, 795 F.2d 1550.

This Court's opinion in *Connick*, however, repeatedly stated that speech even on private matters is not "totally beyond the protection of the First Amendment." 461 U.S. 147, 143. Ensign

Woodward's speech, moreover, occurred in official communication, while on military duty. He did not speak for "personal" reasons. The topic, furthermore, was hardly one of no interest to the public. *Connick*, 461 U.S. 146 (employee's private communication with employer about employer's "allegedly racially discriminatory policies involved a matter of public concern," *citing Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)). Indeed, the Army has argued that gays' presence in the military is a matter of public concern. *See Watkins*, 895 F.2d 729 (concurring opinion).

Unlike the employee's speech in *Connick*, Ensign Woodward's speech was not disruptive. Indeed, we can perceive no Navy interest that was in any way harmed by his statements.

Given the importance of the issues in this case, Ensign Woodward's speech claim, governed by *Connick's* balancing test, is appropriate for resolution in the federal courts. *See Connick*, 461 U.S. 147. The Federal Circuit erred in rejecting this claim without even inquiring why the Navy saw fit to punish Woodward's statements.[8]

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8 The Seventh Circuit held Ben-Shalom's desire to commit homosexual acts, rather than her acknowledging this desire aloud, was the cause of the Army's refusal to re-enlist her, slip op. at 14, but the same cannot be said here. The question whether Ensign Woodward's statements caused his release was pretermitted by the Claims Court when it accepted the Navy's "independent basis" theory. The Navy never has denied that Ensign Woodward's statements, either to Commander Moore or in his letter to the Chief of Naval Personnel, caused his release. Aside from its "independent basis" theory, the Navy has asserted only that such statements are unprotected by the First Amendment.

IV.

THE FEDERAL CIRCUIT NEVER DECIDED ENSIGN WOODWARD'S FIRST AMENDMENT ASSOCIATION CLAIM.

It is ironic that, as we have noted, the Federal Circuit never addressed petitioner's First Amendment association claim. The only snippet in the record offering a possible reason why the Navy deemed Ensign Woodward a threat to its interests pertains to this claim.

The Chief of Naval Personnel's advice to the Correction Board stated the meeting in the Subic Bay Officer's Club "could be characterized as a public flaunting of [Ensign Woodward's] beliefs" constituting "sufficient basis" for his release. This "public flaunting" rationale, based solely on Woodward's being seen in public with a servicemember undergoing discharge for homosexuality, reflects explicit hostility to First Amendment associational rights.

The Court should require the Federal Circuit to address this claim, the appropriate action again being remand to the Claims Court.

V.

IN REJECTING PETITIONER'S NONCONSTITUTIONAL CLAIM, THE FEDERAL CIRCUIT COMMITTED THE SAME ERROR NOTED IN *BERG V. CLAYTOR*, 591 F.2d 849 (D.C. Cir. 1978), A DECISION WELL SUPPORTED BY THIS COURT'S PRECEDENTS.

In *Berg* the District of Columbia Circuit held the Navy obliged to explain its criteria for retaining on active duty some, but not all homosexual officers. As the court more fully stated in the companion case of *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978), this holding was required by basic prin-

ciples of administrative law. The uncontroversial *Berg-Matlovich* holding is well supported by this Court's decisions. *See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29, 43, 47 (1983) (unexplained, inconsistent application of administrative policy is arbitrary and capricious).

In rejecting petitioner's nonconstitutional claim, the Federal Circuit committed the same error noted in *Berg*. The court failed to require the Navy to articulate its retention criteria and apply them to Ensign Woodward's case. That Ensign Woodward's performance was deemed average does not decide the issue. No other ensign in his category was released the same year. Second, there is no indication that performance was a criterion, let alone the only criterion, relevant under the Navy's homosexual retention policy. *See* n.3, *supra.*

The Court should direct the Federal Circuit to remand the case to the Claims Court for thorough examination of this issue. Relief for petitioner on the nonconstitutional claim would avoid the need to resolve the constitutional questions presented. Hence, the claim's importance to the case.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

DANIEL M. SCHEMBER
GAFFNEY, SCHEMBER & KETE, P.C.
1120 G Street, N.W.
Suite 200
Washington, DC 20005
Counsel of Record for Petitioner

JOEL PAUL
Assistant Professor of Law
Washington College of Law
The American University
Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

86-1283

JAMES M. WOODWARD,

Appellant,

v.

UNITED STATES,

Appellee.

DECIDED: March 29, 1989

Before FRIEDMAN, SMITH and ARCHER, Circuit Judges. ARCHER, Circuit Judge.

Appellant James M. Woodward appeals the summary judgment of the United States Claims Court, No. 692-83C (March 31, 1986), upholding the decision of the Department of the Navy (Navy) to release him from active duty. We affirm that judgment, but on other grounds.

Background

Woodward enlisted in the U.S. Naval Reserve in June 1972. At that time, he completed a fitness questionnaire in which he indicated, according to the trial court, that "he was attracted sexually to, or desired sexual activity with, members of his own sex [but that he had never] engaged in homosexual conduct." Despite this acknowledgement.[1/] Woodward was accepted into Navy flight school in June 1972.

1/ The Navy's stated policy at that time was to separate homosexuals and "[m]embers involved in homosexuality" from the service, see e.g., Secretary of the Navy Instruction 1900.9A (July 31, 1972 (SECNAVINST 1900.9A). "Homosexuality" was defined as including "the expressed desire, tendency, or proclivity toward [homosexual] acts whether or not such acts are committed." Id. It was conceded, however, that while this regulation provided for no exceptions, the Navy did retain some officers with homosexual tendencies.

After completing flight school, Woodward was assigned to Carrier Airborne Early Warning Squadron 116, a fleet operational squadron assigned to the Philippines. While stationed there in 1974, Woodward visited the Subic Bay Officers' Club in the company of an enlisted man who was awaiting discharge from the Navy because of homosexuality. Woodward's commanding officer subsequently questioned him about the incident, at which time Woodward "admitted his homosexual tendencies and stated that since he knew no 'gay' officers he had sought the company of 'gay' enlisted men." The commanding officer then asked Woodward to resign. When Woodward refused, the commanding officer wrote to the Chief of Naval Personnel recommending that Woodward be discharged.

Woodward informed the Chief of Naval Personnel in a September 17, 1974 letter via his commanding officer that:

> I am, and have been, since I became sexually aware, primarily homosexually oriented. . . . I do, and will continue to, associate with other homosexuals.
>
> * * *
>
> I am well aware of the problems of social acceptance and special problems of leadership with which I will be confronted as my associates become aware of my homosexuality.
>
> * * *
>
> For the good of both the Navy and myself, I respectfully request the chance to contribute to the defense of the United States as an honest, open, "gay" officer. I recommend that the matter of my homosexuality be dropped as a matter of official concern.

The recommended discharge was not processed and, pursuant to routine Navy practice when a commanding officer's

discharge recommendation is not accepted, Woodward was made available for reassignment or release from active duty. Woodward's file was then reviewed by a personnel officer in the office of the Chief of Naval Personnel responsible for grading an individual's performance records and recommending whether the Navy should reassign or release the individual. According to the officer who reviewed Woodward's file and other officers with review responsibilities, fitness reports comparable to Woodward's reports usually received grades of "C" or "D" and reserve officers who received such grades were released from active duty. A grade of "A" or "B" was generally required for retention on active duty. The record shows that the Navy ranked Woodward below the cutoff point

for retaining a reservist for the following reasons: Woodward had acknowledged his homosexuality; his fitness reports, which were prepared by Woodward's commanding officer prior to Woodward's admission of homosexuality, were "far from outstanding," leaving him uncompetitive with other reserve officers available for reassignment or release; and his release would appropriately implement the Navy policy (at that time) of reducing the number of reserve officers on active duty.

Woodward was released from active duty on October 22, 1974 and reassigned to the Naval Air Reserve Staff H-1 in San Diego, California. He served there without pay in an inactive reserve status and received a promotion to Lieutenant, junior grade. Later, at his

request, the Navy released him from further reserve status. During this period Woodward was passed over twice for a further promotion and the Navy thereafter discharged him when his six-year term of service had been completed.

TRIAL COURT DECISION

Woodward initially brought this action in the United States District Court for the District of Columbia seeking back pay and reinstatement to active duty in the U.S. Naval Reserve. He alleged in part that his release from active status was in violation of his constitutional rights of due process and freedom of association. After prolonged proceedings, including two appeals, it was ascertained that the district court lacked jurisdiction under 28 U.S.C. § 1346 (1982) because Woodward's pay

claim exceeded $10,000. See Woodward v. Moore, 451 F. Supp. 346 (D.D.C. 1978); Woodward v. Moore, No. 78-2062 (D.C. Cir. March 26, 1979); Woodward v. Moore, 25 Fair Emp. Prac. Cas. (BNA) 695 (D.D.C. 1981), vacated, Woodward v. Moore, No. 81-2017 (D.C. Cir. July 28, 1982). this case was then transferred to the Claims Court.

Before the Claims Court, Woodward asserted that the Navy improperly and unconstitutionally released him from active duty because he admitted homosexual tendencies. He contended that his release violated the First and Fifth Amendments of the United States Constitution. The Navy challenged these contentions, arguing that Woodward's release was based on his record and his performance and, further, that the court

lacked jurisdiction to review the Navy's action because of the discretion conferred on the Secretary of the Navy by 10 U.S.C. § 681(a) (1982) (providing that the Secretary may release a reservist from active duty at any time). Both parties moved for summary judgment.

The Claims Court recognized that the Secretary was vested with wide discretion to release a reservist from active duty. The Claims court determined, however, that it could review such a personnel action for violation of constitutional rights where such violations would give rise to monetary claims. The Claims Court then assumed that Woodward's conduct was constitutionally protected and reviewed Woodward's re-release, under the guidelines of Mt. Healthy City School District Board of

Education v. Doyle, 429 U.S. 274 (1977). It found that the Navy had met its burden of showing by a preponderance of the evidence that the Navy would have reached the same decision as to Woodward's release, without regard to the conduct claimed to be constitutionally protected, because his performance ws below the level necessary to be retained on active duty.

ANALYSIS

I

On appeal, Woodward contends that the Claims Court erred in its application of Mt. Healthy City School District Board of Education v. Doyle to this case by finding the Navy had proved an independent basis for his release. He further contends that release from active duty violated his constitutional rights

to privacy and to equal protection under the law.2/

The Navy, on the other hand, asserts that the commanding officer's recommendation to discharge Woodward, the Navy's subsequent review of Woodwrd's record for potential transfer or release, and

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2/ Woodward does not seriously contend on appeal that his statements are entitled to First Amendment protection. Because Woodward's statements were made "for personal reasons and not to inform the public of matters of general concern" they are not entitled to First Amendment protection. Fiorillo v. United States Dep't of Justice, 795 F.2d 1544, 1550 (Fed. Cir. 1986). "Mere publication does not clothe them with First Amendment protection." Id.; Connick v. Myers, 461 U.S. 138, 147-48 (1983). The First Amendment protection to the advocacy of homosexuality discussed in Matthews v. Marsh, No. 82-0216 P, slip op. at 20 n.18 (D. Me. April 3, 1984), vacated and remanded, 755 F.2d 182 (1st Cir. 1985) ("'her overt on-campus involvement in the Wild [sic] Stein Club for "gays and lesbians"' . . . confirms the conclusion that it is impossible to separate the issue of Matthews' self-

(footnote continued)

the decision to release Woodward from active duty are all immune from judicial review. The Navy further contends that homosexuality is not constitutionally protected conduct and, even if such conduct is constitutionally protected, that the Navy met its burden of proving an independent basis for deciding to release Woodward.

II

We consider first the Navy's assertion that the commanding officer's recommendation that Woodward be discharged, the review for transfer or release, and the Navy's subsequent decision to release him from active duty are not judicially reviewable.

2/ (footnote continued) identification from a First Amendment claim" (citation to exhibit omitted)) is inapplicable to the instant case.

The statutory authority given to the Secretary of the Navy to release a reserve officer from active duty is not subject to any procedural or substantive limitation. It is contained in 10 U.S.C. § 681 (a) (1982) and provides that "the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty." The applicable Navy instruction preserves the discretion granted by that section and does not provide an independent source of procedural or substantive protection.3/ See Webster v. Doe, 108 S.Ct.

3/ Woodward's contention that he was not afforded the benefit of the Navy's admitted practice of retaining some homosexuals while discharging others is without merit. Woodward was not discharged for homosexuality; rather he was considered for reassignment, but because of his mediocre record as an officer and his homosexuality he was

(footnote continued)

2047, 2053 n.8 (1988), aff'g Doe v. Casey, 796 F.2d 1508, 1520 (D.C. Cir. 1986). Cf. Sampson v. Murray, 415 U.S. 61, 71 (1974) (federal courts have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed its administrative regulations). Secretary of the Navy Instruction 1920.6 (July 14, 1971) (SECNAVINST 1920.6), setting forth "procedures, regulations, and instructions for implementation of statutes which provide for the separation of officers from the Navy and Marine Corps, termina-

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3/ (footnote continued)
ultimately released from active duty pursuant to 10 U.S.C. § 681. Consequently, there is no inconsistency between Woodward's treatment and the Navy's practice of considering some homosexuals for retention.

tion of appointments, revocation of commission and/or discharge, release from active duty," provides as to reserve officers:

> c. Reserve Officers
>
> . . . .
>
> (3) Release from Active Duty. In the case of Reserve officers of the Navy and Marine Corps, the Chief of Naval Personnel or the Commandant of the Marine Corps, respectively, may at any time, for any reason, release a Reserve officer from active duty. . . .

SECNAVINST 1920.6 ¶ 6(c)(3).

The Navy relies on Denby v. Berry, 263 U.S. 29 (1923), to support its position that Woodward's release from active duty was not subject to judicial review. There, the Court explained that a statute and regulation requiring a hearing before a Navy Retiring Board before an officer could be retired did not limit

the discretion of the President and the Secretary of the Navy to release individuals from active service and put them on inactive duty. It said:

> Nowhere is there found any limitation upon the discretion of the Executive in this regard. The orders in such cases were in the nature of military orders by the Commander-in-Chief in the assignment or withdrawal of available forces to or from duty for the good of the service. Such orders of withdrawal could not and did not make members of the Naval Reserve Force civilians. They did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority.

263 U.S. at 34.

The Navy also cites Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986), where we similarly held that Alberico's release from active duty did not deprive him of due process and that

his "interest in remaining on active duty was a mere expectancy, and therefore not entitled to protection as a property right." 783 F.2d at 1027. Moreover, Orloff v. Willoughby, 345 U.S. 83, 93094 (1953), cautions that "judges are not given the task of running the [military]. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian." The judiciary therefore must be "scrupulous not to interfere with legitimate [military] matters. . . ." Id. at 94.

While the statute and cited authorities indicate that the Secretary's discretion is generally unfettered, employment actions claimed to be based on constitutionally infirm grounds are nevertheless subject to judicial review. The

Supreme Court's decision in Webster v. Doe, 108 S.Ct. 2047 (1988), demonstrates that the delegation of broad discretion in employment matters on an agency head does not preclude judicial review of constitutional claims unless congressional intent to do so is made clear.4/ Webster concerned reviewability under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1982), of the decision of the Director of the Central Intelligence Agency (CIA) to terminate "an Agency employee whenever the Director 'shall deem such termination necessary or advisable in the interests

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4/ The Court explained that it requires "this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 108 S.Ct. at 2053.

of the United States,' . . . not simply when the dismissal is necessary or advisable to those interests." 103 S.Ct. (emphasis by the Court). Such language, according to the Court, "strongly suggests that its implementation was 'committed to agency discretion by law'" under section 701(a) of the APA. Id. The Court determined, however, that Congress' grant of discretionary authority to the Director was not "meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section." Id. at 2054. It rejected the Director's position that "all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of

the Director, and are hence unreviewable under the APA." Id.

Although Webster involved equitable remedies under the APA, the same principles are applicable to pay claims under the Tucker Act in the Claims Court. Koster v. United States, 685 F.2d 407, 412 (Ct. Cl. 1982) ("Where . . . there is no problem of sovereign immunity, executive discretion must be subject at least to constitutional review." (footnote omitted)); cf. Voge v. United States, 844 F.2d 776, 781 n.2 (Fed. Cir.), cert. denied, 109 S.Ct. 365 (1988). Accordingly, the Claims Court was correct in holding that it had jurisdiction in a claim for money damages to consider Woodward's allegation of violations of constitutional rights. Koster v. United States, 685 F.2d at

412; Padula v. Webster, 822 F.2d 97, 101 (D.C. Cir. 1987) ("even where agency action is 'committed to agency discretion by law,' review is still available to determine if the Constitution has been violated").

III

Woodward challenges the Claims Court's decision on the basis that the Navy failed to establish a defense under Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), because the Navy did not show by a preponderance of the evidence that Woodward would have been released from active duty in the absence of his admission of homosexuality. The Supreme Court in Mt. Healthy stated that "[t]he constitutional principle at stake is sufficiently vindicated if such an

employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct." Id. at 285-286. The evidentiary burden of the Navy, assuming (as the Claims Court did) that homosexuality is protected conduct, was to prove that it would have taken the same actions "even in the absence of the protected conduct." Id. at 287. See Brown v. Bullard Indep. School Dist., 640 F.2d 651, 653 (5th Cir.) cert. denied, 454 U.S. 828 (1981). The Claims Court in its opinion stated that:

> The [Navy] has introduced credible evidence by personnel officers who regularly review files that even without consideration of Woodward's homosexual tendencies, he would

> have been recommended for release at the time his record was reviewed. In other words, a Navy Ensign with a similar record to [Woodward's] would have been released if his file had reached the reviewing office at the same time Woodward's file did. (Emphasis added.)

The Court's reasoning, however, fails to take into account that Woodward's file would not have reached the reviewing office at all had he not been homosexual and admitted it to his commanding officer. The Navy's statistical information presented by Woodward shows there were no other reserve officers in Woodward's grade and category (132X)[5/] who were released in 1975, or in the prior or following years. The reason

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5/ Four other ensigns were released in 1975 but they were Student Naval Flight Officers (137X).

for this, according to the testimony of Woodward's reviewing officer, was that "ensigns were not normally made available for rotation." Thus, the other 130 officers in Woodward's category who were released in 1975 all were of the grade of Lieutenant J.G. or above and none were ensigns. There was also evidence before the court that Woodward's ranking by his commanding officer (before his verbal acknowledgement of homosexuality) would place him between the 50th and 60th percentile vis-a-vis his contemporaries, indicating that the files of a large number of ensigns with lower ranking never reached the reviewing office in 1975.

Under these circumstances, the testimony of the Navy reviewing officers that an officer having the same

ranking as Woodward would have been released had his file been reviewed does not establish a Mt. Healthy defense. The facts are clear that ensigns with low rankings were not referred to the reviewing office for reassignment or release. Only because of his homosexuality was Woodward referred for review and it was, in part, the basis for his release from active duty.

IV

Woodward contends that because homosexuality is protected under the constitutional right to privacy, the Secretary may not, consistent with the due process clause of the Fifth Amendment, use Woodward's admitted homosexuality as a criterion for referring him for review or as a basis for his release from

active duty.[6] Because the Supreme

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[6] In describing himself, Woodward at various times stated that "he was attracted sexually to, or desired sexual activity with, members of his own sex," that "since he knew no 'gay' officers he sought the company of 'gay' enlisted men," that he "[does], and will continue to, associate with other homosexuals," and that he wanted to remain in the Navy "as an honest, open, 'gay' officer." Also, Woodward visited an Officers' Club with an enlisted man who was awaiting discharge from the Navy for homosexuality. There is no claim by Woodward that he is celibate. Nevertheless, Woodward's counsel, in his briefs, attempted to characterize Woodward as having only homosexual tendencies. While acts of sodomy have not been expressly admitted by Woodward, in view of the above we need not address the factual situation where there is action based solely on "status as a person with homosexual orientation." benShalom v. Marsh, ____ F. Supp. _____, No. 88-C-468, slip op. at 2 (E.D. Wis. January 10, 1989) (no proof she "had engaged in homosexual acts or had done anything that could be interpreted as a homosexual advance toward another female soldier"). See also benShalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980). Cf. Watkins v. United States Army, 847 F.2d 1329 (9th Cir.), reh'g en banc ordered, 847 F.2d 1362 (1988) (en banc) (government suggested

(footnote continued)

Court held in Bowers v. Hardwick, 478 U.S. 186 (1986), that homosexual conduct is not one of the fundamental rights subject to heightened review under the due process clause, we cannot agree with Woodward.

In Hardwick, the Court recognized that the due process clauses of the Fifth and Fourteenth Amendments "have been interpreted to have substantive content, subsuming rights that to a great extend are immune from federal or state regulation or proscription." Id. at 191. The Court noted that "rights qualifying for heightened judicial protection . . . include[] those fundamental liberties that are 'implicit in the

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6/ (footnote continued)
en banc rehearing on the basis that the record showed that Watkins had engaged in homosexual conduct).

concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'" id. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), or, described otherwise, "are . . . those liberties that are 'deeply rooted in this Nation's history and tradition.'" Id. at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)).

In its opinion in Hardwick, the Supreme Court reiterated that the right of privacy concerned matters of the family, marriage and/or procreation.

> The reach of this line of cases was sketched in Cary v. Population Services International, 431 U.S. 678, 685 (1977). Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), were described as dealing with child rearing

> and education; Prince v. Massachusetts, 321 U.S. 158 (1944), with family relationships; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), with procreation; Loving v. Virginia, 388 U.S. 1 (1967), with marriage; Griswold v. Connecticut, [381 U.S. 479 (1965)], and Eisenstadt v. Baird, [405 U.S. 438 (1972)], with contraception; and Roe v. Wade, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. Carey v. Population Services International, [431 U.S.] at 688-689.

478 U.S. at 190. The Court distinguished homosexuality on the basis that it had "[n]o connection" with family, marriage or procreation, id. at 191, and rejected the notion that "any kind of private sexual conduct between consenting adults is constitutionally insulated." Id. The Court noted that Carey

v. Population Services International, 431 U.S. 678 (1977), "twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far." Hardwick, 478 U.S. at 191 (citing Carey, 421 U.S. at 688 n.5, 694 n.17).

The Hardwick Court stated that it is not "inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause" and that "[t]here should be . . . great resistance to expand the substantive reach of [that clause], particularly if it requires redefining the category of rights deemed to be fundamental." Hardwick, 478 U.S. 194-195. The Court therefore concluded that there was no fundamental right of homosexuals

to engage in consensual sodomy and upheld the George state criminalizing sodomy.

The Court's admonition against taking an expansive view of authority to discover new fundamental rights imbedded in the due process clause counsels against an extension of privacy rights to homosexuality. Hardwick, 478 U.S. 194-195. As stated in Dronenburg, "[i]f it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, . . . it is certain that the lower courts should not do so." 741 F.2d at 1396 (footnote omitted). Moreover, the Supreme Court cases dealing with protected privacy rights are essentially conclusions about the particular rights enunciated and cannot be readily applied in other fac-

tual contexts. See Dronenburg v. Zech, 741 F.2d 1388, 1396 (D.C. Cir. 1984). Protection of homosexuality as a private right, therefore, is not an apparent or necessary result that can be reached from the Supreme Court's precedent. We must therefore reject Woodward's claim that homosexuality is constitutionally protected under the right of privacy.

V

Woodward also argues that the Navy discriminated against him on the basis of his homosexuality, and that this violated his constitutional right to equal protection.7/ We find Hardwick

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7/ The principles applicable to the states pursuant to the Fourteenth Amendment's equal protection clause are applied to the Federal Government as a component of the Fifth Amendment due process clause. Beller v. Middendorf, 632 F.2d 788, 801 n.8 (1980), cert.

(footnote continued)

equally persuasive, if not dispositive, of this argument as well.

Under equal protection analysis, the Supreme Court has fashioned a "two-tiered" approach to judicial review. Under this approach, the Court applies a "strict scrutiny" or "compelling reason" standard "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." Massachusetts Bd. of Retirment v. Murgia, 427 U.S. 307,

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7/ (footnote continued) denied, 452 U.S. 905 (1981) and 454 U.S. 855 (1981); see Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("Fifth Amendment equal protection claims . . . precisely the same as equal protection claims under the Fourteenth Amendment."); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

312-13 (1976) (footnotes omitted).[8] Otherwise, discriminatory government action need only be justified upon a rational basis standard. Id. at 314.

The Supreme Court has identified only three suspect classes: racial status, Loving v. Virginia, 388 U.S. 1, 11 (1976), Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879); national ancestry and ethnic origin, Korematsu v. United States, 323 U.S. 214, 216 (1944), Stauder v. West Virginia, 100 U.S. 307-08; and alienage, Graham v. Richardson, 403 U.S. 365, 372 (1971). Two other classifications have been identified by

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[8] Because the Supreme Court held in Bowers v. Hardwick that there exists no fundamental right to engage in homosexual conduct, we need not further consider Woodward's claims from that standpoint.

the Court as quasi-suspect:[9] gender, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982), and illegitimacy, Lalli v. Lalli, 439 U.S. 259, 265 (1978). Woodward would have this court add homosexuality to that list. This we decline to do.

Homsexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in

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[9] The standard applied to a "quasi-suspect class is that the classification "must serve important government objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

nature. See Bowen v. Gilliard, 483 U.S. 587, ___, 107 S.Ct. 3008, 3018 (1987) ("The disadvantaged class is . . . not . . . 'suspect' or 'quasi-suspect' . . . they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986))); Frontiero v. Richardson, 411 U.S. 677, 686 (1973). The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups.

After Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in Padula v. Webster that "there can hardly be more palpable discrimination against a class

than making the conduct that defines the class criminal." 822 F.2d 97, 103 (D.C. Cir. 1987).10/

Accordingly, we conclude that Woodward is not a member of a class to which heightened scrutiny must be afforded nor that the Navy must have a compelling interest to justify discrimination against Woodward because of his admitted homosexuality.

VI

The Navy's challenged practice

10/ Sodomy, an act criminalized by a Georgia state statute which was found to pass Constitutional muster in Hardwick, 478 U.S. at 196, is usually defined broadly in the relevant state criminal statutes to include "any sexual act involving the sex organs of one person and the mouth or anus of another." See, e.g., id. at 188 n.1. These practices are the most common sexual practices of homosexuals, with oral sex being the primary form of homosexual activity. See A. Bell & M. Weinberg, Homosexualities 106-11, 327-30 (1978).

regarding homosexuals need only be rationally related to a permissible governmental end to pass constitutional muster. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441-42 (1985). Although this issue was not specifically argued by Woodward, we assume it to be inherent in his claim to be a member of a suspect class entitled to heightened scrutiny.

We are convinced that the Navy's policy on homosexuality is rationally related to a permissible end. See Dronenburg v. Zech, 741 F.2d at 1397-98; Beller v. Middendorf, 632 F.2d at 811-12. As stated in Dronenburg:

> The Navy's policy requiring discharge of those who enage in homosexual conduct serves legitimate state interests which include the maintenance of "discipline, good order and morale[,] . . . mutual trust and confidence among service members,

> . . . insur[ing] the integrity of the system of rank and command, . . . recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security." SEC/NAV 1900.9D (Mar. 12, 1981). We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving those legitimate interests. See Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. [1980]), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 [1981]. The unique needs of the military, "a specialized society separate from civilian society," Parker v. Levy, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974), justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission.

741 F.2d at 1398 (appendix citation omitted).

Special deference must be given by a court to the military when adjudicating matters involving their decisions on discipline, morale, composition and the like, and a court should not substitute

its views for the "considered professional judgment" of the military. Goldman v. Weinberger, 475 U.s. 503, 508 (1986); Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981); Orloff v. Willoughby, 345 U.s. 83, 93-94 (1953). In Beller v. Middendorg, Judge, now Justice, Kennedy said that "constitutional rights must be viewed in the light of the special circumstances and needs of the armed forces." 632 F.2d at 810. We think this is particularly true where, as here, the Secretary was given extremely broad discretion by Congress to release a reserve officer from active duty at any time, and the applicable regulations do not in any way limit that discretion. See 10 U.S.C. § 681(a) (1982); SECNAVINST 1920.6 (July 14, 1971); SECNAVINST 1900.9A (July 31, 1972).

We therefore affirm the judgment of the Claims Court on different grounds for the reasons set forth above.

AFFIRMED

DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

WASHINGTON, DC 20370

JJC:mb

28 February 1977

LTJG James M. Woodward, USNR

4450 Oregon Avenue, Apt. 8

San Diego, California 92116

Dear Lieutenant Woodward:

Reference is made to your application for correction of your naval record under the provisions of Title 10 U.S.C. 1552.

Under long established rules followed by the courts and administrative boards, a presumption of regularity attaches to official records. Consonant therewith, the burden of proof is on a Petitioner to show by documentary evidence that an error has occurred or an injustice has

been suffered.

Your allegations of error and injustice have been reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, naval records, and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board determined that insufficient evidence has been presented to indicate probable material error or injustice. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable

action cannot be taken. You are privileged to submit new and material evidence for consideration. As explained, however, the burden is on you to show that an error or injustice has occurred.

Sincerely,

SIGNED

JOHN E. CORCORAN, JR.

Executive Secretary

Copy to: David Gespass, Esquire
Gespass & Finzel
612 Lexington Place, N.E.
Washington, D. C. 20002

James Mark WOODWARD, Plaintiff

v.

Commander J.A. MOORE, et al., Defendants

Civ. A. No. 76-1199.

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

May 31, 1978.

MEMORANDUM OPINION AND ORDER

BARRINGTON D. PARKER, District Judge.

James M. Woodward, a former United States Naval Air Reservist, brings this action against several defendants including his former immediate commanding officer, the Secretary of the Navy and other Navy officials, seeking reinstatement to active duty in the United States navy, back pay and other relief.

Cross motions for summary judgment

have been filed by the parties. After a consideration of the administrative record, memoranda of points and authorities, and argument of counsel, the Court determines that the defendants are entitled to summary judgment and the complaint should be dismissed.

I.

The uncontroversial material facts may be briefly stated. Plaintiff Woodward was commissioned as an Ensign in the United States Naval Reserve in October, 1972. He was assigned to active duty status, received additional training as a naval flight officer, and served in that capacity through the summer of 1974. In September, 1974, after Woodward was seen in an officers' club associating with an enlisted man who was being separated from duty for

homosexual activities, he admitted to his commanding officer that he had homosexual tendencies. Because of these matters plaintiff was requested to resign. He refused to do so, explaining that he wanted to finish his term of obligated service. His commanding officer, Commander Moore, then advised him that he would be administratively separated. On September 27, 1974, a recommendation was submitted to the Chief of Naval Personnel that plaintiff be administratively processed for discharge under favorable conditions.

That recommendation was not accepted and on October 4, 1974, the Chief of Naval Personnel ordered plaintiff to report for separation processing. Thereafter, on October 22, he was released from active duty and assigned a

reserve position in California, where he served until February, 1975. Later, at plaintiff's request, he was released from further active reserve duty. He applied for relief before the Board of Correction of Naval Records, claiming error in the action by the Chief of Naval Personnel. The application was denied. Woodward remains an Ensign in the Naval Air Reserve and he has not been discharged from the Navy.

II.

[1] It is a well-established proposition that officers in the armed forces of the United States have no constitutional right to be promoted or retained and their services may be terminated at any time with or without reason. Pauls v. Secretary of Air Force, 457 F.2d 294, 297 (1st Cir. 1972). As a reserve offi-

cer, the plaintiff's change in status was a matter committed to the sole discretion of the Secretary of the Navy or the President of the United States. As the Supreme Court noted in commenting on the 1916 statute that created the Naval Reserve Force.[1]

> [I]t is quite evident . . . that members of this force occupied two statuses, one that of inactive duty, and the other of active service. It is further clear that it was within the power of the President, and of the Secretary of the Navy acting for him, to change the members of the Reserve Force from one status to the other. . . . Orders releasing individuals from active duty were clearly within the power of the President and of the Secretary of the Navy acting for him in the administration of the act.

Denby v. Berry, 263 U.S. 29, 33, 44 S.Ct. 74, 75, L.Ed. 148 (1923).

[1] Naval Appropriation Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 587.

[2] Title 10 U.S.C. § 681, the current statute relative to the service and assignment of reservists, provides in part:

> (a) Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

This statute has been recognized as clear authority for the release of a reservist from active duty with the determination of the conditions and circumstances governing such release remaining within the sound discretion of the Secretary of the Navy. Abruzzo v. United States, 513 F.2d 608 (Ct.Cl. 1975); Denton v. United States, 204 Ct.Cl. 188 (1974); cert. denied, 421 U.S. 963, 95 S.Ct. 1949, 44 L.Ed 449 (1975); Mercereau v. United States, 155 Ct.Cl. 157 (1961). The use of

Woodward's admission of homosexual tendencies and his association with homosexuals as a basis for the exercise of that discretion did not result in invidious discrimination in violation of due process, nor in a violation of his right to freedom of association. Berg v. Claytor, 436 F.Supp. 76 (D.D.C. 1977), appeal docketed, No. 77-1785 (D.C.Cir. Aug. 29, 1977). Woodward's claims that his status was changed for unlawful reasons must therefore be rejected.

[3] Woodward also claims procedural flaws in his release from active status. He claims that his discharge was precluded by the "national emergency" exception of § 681(b), which provides:

> (b) In time of war or of national emergency declared by Congress or the President after January 1, 1953, a mem-

> ber of a reserve component may be released from active duty (other than for training) only if--
>
> (1) a board of officers convened at his request by an authority designated by the Secretary concerned recommends the release and the recommendation is approved;
>
> (2) the member does not request that a board be convened; or
>
> (3) his release is otherwise authorized by law.

While such procedural guarantees do limit the exercise of the Secretary's discretion, see Roberts v. Vance, 119 U.S.App.D.C. 367, 343, F.2d 236 (1964), it does not appear that § 681(b) applies to the present situation.

Two national emergencies were in effect at the time of Woodward's assignment to inactive status and would appear

to call § 681(b) into play.[2] The first declaration related to a work stoppage by United States Postal Service employees in early 1970,[3] and the other concerned an unfavorable balance of payments position of the United States in 1971 which threatened the country's trade and international competitive position.[4] The first of these, dealing with the postal strike, is the only one of the two relevant to Woodward's situation, since it alone involved the call-up of reserve forces due to the declared

[2] Section 681(b) refers only to national emergencies occurring after January 1, 1953. National emergencies declared prior to that date do not provide a basis for the procedural rights contained in the statutory provision.

[3] Proclamation 3972, March 23, 1970.

[4] Proclamation 4074, August 15, 1971.

emergency.[5] That strike, however, was short-lived and its effects long over by the time of Woodwrd's reassignment; there was no requirement that his request for a board of officers under § 681(b) be granted.[6]

[4] Woodward also contends that the procedures set out in Article 3830160(6), Bureau of Naval Personnel Manual, governed his release from active

[5] The legislative history of § 681(b) indicates that it was enacted to provide a right of review to a reservist who was being involuntarily released when other reservists were being involuntarily called to active duty. 1952 U.S. Code Cong. & Admin. News at 2036. In limited national emergencies, such as the two applicable here, § 681(b) would be logically applicable only if reserves were called to meet the emergency.

[6] There are other exceptions to the Secretary's discretion under § 681, none of which are applicable to Woodward. See, e.g., 10 U.S.C. §§ 679 and 680 (Active Duty Agreements); 10 U.S.C. § 163(d) (Limitation on Separation).

duty and were not followed. Specifically, he argues that a recommendation for release and submission of a special fitness report from his commanding officer were required. He also contends that he was denied a hearing.

His reliance on Article 3830160(6) is misplaced. The Article provides safeguards for officers who are being permanently separated from service and whose appointment is being revoked. No punitive action is reflected in the plaintiff's personnel folder nor does his release from active duty status stigmatize him in any way or reflect that his service was other than honorable. See Sims v. Fox, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975); Knehans v. Callaway, 403 F.Supp.

290 (D.D.C. 1975); see also Kennedy v. Secretary of Navy, 131 U.S.App. D.C. 39, 401 F.2d 990 (1968). While Commander Moore did originally recommend an administrative discharge, the Secretary of the Navy elected only to release the plaintiff from active duty as a reservist. The Secretary's action was permissible and pursuant to statutory authority, 10 U.S.C. § 681(a), and regulations, 32 C.F.R. § 714.6(c)(3). Woodward's commission has not been revoked, his appointment as a reserve officer has not been terminated and he retains his status as an Ensign in the United States Naval Reserve; his obligation to render service has not been terminated.[7]

On the basis of the foregoing it is

[7] See 32 C.F.R. § 714.3(j), (m).

this 31st day of May, 1978,

ORDERED that the plaintiff's motion for summary judgment is denied; and it is

FURTHER ORDERED that the defendant's motion for summary judgment is granted and the complaint of James Mark Woodward is dismissed.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2062 September Term, 1978

Civil Action No. 76-1199

James Mark Woodward,

Appellant

v.

Commander J.A. Moore, et al

BEFORE: Bazelon, Leventhal and Robinson, Circuit Judges

O R D E R

On consideration of appellant's motion for remand, the opposition thereto and of appellant's reply, it

ORDERED by the Court that the aforesaid motion is granted and this case is remanded to the District Court.

The Clerk is requested to transmit a certified copy of this order to the

District Court.

Per Curiam

Circuit Judge Robinson did not participate in this order.

[Entered March 26, 1979.]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JAMES M. WOODWARD, Plaintiff,	)	
v.	)	Civil Action
COMMANDER J. A. MOORE, et al., Defendants.	)	No. 76-1199

MEMORANDUM OPINION

Plaintiff, a former officer in the Naval Reserve, has moved this Court to reconsider its Memorandum Opinion and Order of May 31, 1978, sustaining his release from active duty in light of two intervening decisions of the United States Court of Appeals for the District of Columbia, Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978), and Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978). After examining the

rationale behind those two decisions, the Court concludes that its May 31, 1978, Order should be vacated, and that this matter should be remanded to the Secretary of the Navy to enable him to state his reasons for releasing plaintiff from active duty.

The facts, as set forth in the initial decision, Woodward v. Moore, 451 F. Supp. 346 (D.D.C. 1978), may be summarized briefly. While serving on active duty in the Pacific as naval flight officer, Woodward was seen in an officer's club in the company of an enlisted man who was being separated from the service for homosexual activities. When questioned about this incident, he admitted to his commanding officer that he had homosexual tendencies. On September 27, 1974, his commander recom-

mended to the Chief of the Bureau of Navy Personnel that Woodward be administratively processed for discharge under favorable conditions. That recommendation was not accepted. Instead, on October 6, plaintiff was notified that he was to be released from active duty and was ordered to return to the United States. Later, he was officially released from active service and assigned to reserve duty in California. Plaintiff subsequently asked to be released from further active duty.*/

In June 1976, plaintiff filed this complaint asking for money damages and reinstatement on the grounds that the

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*/ Plaintiff states in his motion to reconsider that he has since been twice passed over for promotion and, as a result, has been discharged from the service.

Navy's action violated its own regulations and plaintiff's rights under the First, Fifth, and Ninth Amendments. This Court granted defendants' motion for summary judgment on all of these claims and held that, under 10 U.S.C. § 681, the decision to release plaintiff from active duty was "within the sound discretion of the Secretary of the Navy." The Court added that "[t]he use of Woodward's admission of homosexual tendencies and his association with homosexuals as a basis for the exercise of that discretion did not result in a violation of his right to freedom of association. Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977) . . . ." 451 F. Supp. at 348. Finally, the Court held that the Navy had not ignored its own regulations in not allowing plaintiff a

hearing before a board of officers before releasing him from active service. Id. at 349.

The Court of Appeals has since reversed the District Court's decision in Berg, adopting the same rationale in that case as it had used in the companion case of Matlovich v. Secretary of the Air Force, supra. In Matlovich, the Court of Appeals held that where Air Force regulations allowed the exemption under "the most unusual of circumstances" of some individuals from the general policy of separating all homosexuals from the service, the Air Force was obligated to state the reasons for not granting the exemption in Matlovich's case. 591 F.2d at 857. In Berg, the Court found that although the Navy had no comparable "retention" exemption, the

service had interpreted its otherwise mandatory regulation providing for separation of homosexuals as not requiring separation in all cases. 591 F.2d at 851.*/ In neither opinion did the Court of Appeals express its view on the district court's determination that there was no constitutional right to engage in homosexual activity and that it was not unconstitutional for the services to maintain a general policy of discharging homosexuals. Berg and Matlovich thus stand for the position that, while the service may use homosex-

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*/ On January 20, 1978, the Secretary of the Navy issued SECNAV Instruction 1900.9C setting forth Navy policy toward service members involved in homosexual conduct. The Instruction includes standards for retention. See Declaration of W. Graham Claytor, filed September 14, 1979, Berg v. Claytor, C.A. No. 76-944 (D.D.C.)

uality as a basis for discharge, principles of administrative law require that they set forth their reasons for denying exemptions to a policy recognized by regulation and prior practice.

The question presented by plaintiff's motion to reconsider is whether this rationale applies where a reserve officer who merely admits to "homosexual tendencies" is released from active duty rather than completely separated. In their opposition, defendants argue that the Berg and Matlovich decisions are inopposite in that the regulations governing separation generally require the services to make findings justifying the decision to discharge. See Berg, 591 F.2d at 851 n. 4; Matlovich, 591 F.2d at 858-59. These findings enable the courts to exercise their well-

established duty to review discharges for compliance with the Constitution, statutes and regulations. Id. at 859-60. In contrast, defendants point out there are no regulations requiring the Navy to make findings to support the release of a reserve officer from active duty. Moreover, defendants maintain that 10 U.S.C. § 681(a) vests the Secretary of the Navy with complete discretion in determining when a reserve officer should be released from active service. According to defendants, this determination, unlike the decision to discharge, cannot be subject to judicial review if the Secretary is to be free to adjust military manpower to the current demands of national defense. See Curran v. Laird, 420 F.2d 122, 131 (D.C. Cir. 1969) (decision on how to add or sub-

tract from reserve fleet of merchant vessels not subject to judicial review); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968) (decision to deny hardship exemption to reservist called to active service not subject to judicial review); Overseas Media Corp. v. McNamara, 385 F.2d 308, 314 (D.C. Cir. 1967).

Despite these considerations, the Court is not convinced that this case is sufficiently different from Berg and Matlovich to permit an opposite result. To be sure, plaintiffs Berg and Matlovich were entitled to administrative procedures before discharge, while reservists such as Woodward released to inactive duty normally have no such entitlement. Aside from this point, however, the cases are quite similar.

The Navy would be hard pressed to justify Woodward's release on manpower grounds; the chronology of events leading to Woodward's release leaves little doubt that his release was the result of his admission that he had homosexual tendencies. And while release from active service is a less drastic measure than the complete separation imposed on Berg and Matlovich, it clearly is an adverse action; Woodward's service pay was stopped and his chances of advancement were effectively ended. More importantly, in all three cases, the respective service denied the plaintiff a discretionary exemption from adverse consequences without providing the rationale for the denial.*/

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*/ A recent decision by the Ninth Circuit sustained the constitutionality
(footnote continued)

Defendants here have presented no satisfactory reason for their silence.

Nor is the Court persuaded by defendants' argument that the decision to release plaintiff from active service involved military operations and the disposition of men and is therefore immune from judicial review. The defendants maintain that the discretion granted to the service Secretaries in section 681(a) to release reserves from active duty was granted to enable those officials to control military manpower based on the needs of the service. This

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*/ (footnote continued)
of a regulation that court interpreted to mandate separation for homosexual acts. Beller v. Middendorf, No. 77-1354 (9th Cir., October 23, 1980). The Ninth Circuit noted that this decision was directly contrary to this Circuit's decision

Court would not presume to review the Navy's determination that it needed fewer flight officers on active duty, or even which reserve officers should be released in order to effect this determination. See Curran v. Laird, supra. There is nothing in the record before the Court, however, which indicates that the Secretary was making such an adjustment when he released plaintiff from active duty.**/ The need for unfettered discretion is far less compelling where, as in this case, the undisputed facts

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**/ The record does reveal that the Navy released nearly 2600 Reserve officers from active duty between January 1, 1975 and November 29, 1976, a period commencing approximately ten weeks after plaintiff's release. But this fact does not in any way affect the strong inference based on the facts of this case that plaintiff's release resulted solely from his admission of homosexual tendencies.

indicate that the service exercised its discretion to effect its policy of removing homosexuals from the service. If this is in fact the case, Woodward, like Berg, is entitled to know why the Navy's unwritten policy of allowing certain homosexuals to remain in the service was not applied in his case. See 591 F.2d at 851. Accordingly, this matter will be remanded to the Navy to allow that service to provide a reasoned basis for its decision to remove the plaintiff from active duty. Plaintiff's argument that he be entitled to judgment at this stage of the litigation must be rejected. Despite the considerable interval between plaintiff's release from active duty and this remand, the service is entitled to an opportunity to explain its decision in a fashion that

may be reviewed by this Court. Defendants are cautioned, however, that "counsel's post hoc rationalization cannot substitute for the agency's own failure" to provide reasons. Matlovich v. Secretary of the Air Force, 591 F.2d at 860 n. 20.

An appropriate Order accompanies this Memorandum Opinion.

Barrington D. Parker
United States District Judge

Entered:

March 13th, 1981

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JAMES M. WOODWARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 76-1199
COMMANDER J. A. MOORE,	)	
et al.,	)	
	)	
Defendants	)	

ORDER

In accordance with the accompanying Memorandum, it is this 13th day of March, 1981,

ORDERED that plaintiff's motion for reconsideration is granted, and the Memorandum Opinion and Order of May 31, 1978, are vacated; and it is

FURTHER ORDERED that this case is remanded to the Secretary of the Navy who shall by June 30, 1981, provide the Court with a statement of reasons for plaintiff's release from active duty,

including an explanation of the application of the Navy's retention policy regarding homosexuals to this plaintiff.

Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JAMES M. WOODWARD :

Plaintiff, :

v. : Civil Action No. 76-1199

COMMANDER J. A. MOORE, :

et al., :

Defendants. :

MEMORANDUM ORDER AND JUDGMENT

Plaintiff, formerly an officer in the Naval Reserve, brought this action to challenge his release from active duty, alleging that it was improperly based on his admission that he had homosexual tendencies. Initially, the Court granted the defendants' motion for summary judgment, finding that the controlling statute, 10 U.S.C. § 681(a), placed the decision to release a reservist from active duty within the sound discretion

of the Secretary of the Navy. Woodward v. Moore, 451 F.Supp. 348 (D.D.C. 1978). Plaintiff then appealed this decision. The case was remanded before argument, however, at plaintiff's suggestion, for this Court to reconsider its decision in light of two intervening decisions of the Court of Appeals: Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C.Cir. 1978), and Berg v. Claytor, 591 F.2d 849 (D.C.Cir. 1978).

Upon reconsideration, the Court vacated its initial decision and remanded this matter to the Navy with instructions that the service:

> provide the Court with a statement of reasons for plaintiff's release from active duty, including an explanation of the application of the Navy's retention policy regarding homo-

sexuals to this plaintiff. */

The Navy has complied with this requirement by submitting five sworn declarations by officers who participated in the processing of plaintiff for release from active duty.*/ Relying on these declarations, the defendants have renewed their motion for summary judgment. After reviewing the renewed motion, the supporting declarations, and the plaintiff's opposition, the Court concludes that defendants are now entitled to summary judgment.

In its Memorandum Opinion of March 13, 1981 granting the plaintiff's motion

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*/ Memorandum Opinion and Order, filed March 13, 1981.

*/ Declaration of George F. Cronin, John S. Disher, Albert J. Herberger, Victoria S. Matthews, and Ben T. Sanders, filed July 9, 1981.

for reconsideration, this Court relied on the Berg and Matlovich cases for the proposition that

> while the service may use homsexuals as a basis for discharge, principles of administrative law require that they set forth their reasons for denying exemptions to a policy [of retaining some homosexuals] recognized by regulation and prior practice.

Memorandum Opinion at 3. The Court further noted that the Secretary's discretion to release reservists under 10 U.S.C. § 681 was based on the need to adjust manpower levels in response to service requirements, and that the Navy had offered nothing to show that this need was in fact involved in the decision to release the plaintiff. Id. at 5.

The declarations filed by the navy address the factual issues identified by the Court in its March 13 Opinion. They

establish that the recommendation made by plaintiff's superior, that plaintiff be separated from the service, was considered by a section of the Bureau of Naval Personnel designated "Pers 82." This section determined that plaintiff should not be separated, but instead that he should be reassigned or released from active duty. Pers 82 then referred plaintiff's case to "Pers 4," another section within the Bureau which dealt with the reassignment or release of reserve officers.

While the Bureau of Naval Personnel was considering plaintiff's case, the Navy was engaged in a general reduction in manpower in connection with the reduction of American forces in Southeast Asia. To accomplish this, the Navy was reviewing the personnel files of

reserve officers and ranking them according to their suitability for retention. Plaintiff's file was reviewed and he was ranked well below cutoff point for retaining a reservist. The Navy provides four reasons for this ranking: 1) plaintiff's acknowledged homosexual tendencies; 2) his fitness reports, while above average were "far from outstanding"; 3) he compared unfavorably with other officers available for retention; and 4) plaintiff's release "would appropriately implement" the requirement that the number of reserve officers be reduced.*/

The Court finds these reasons sufficient to support the Navy's action. The Navy has established that plaintiff's

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*/ Declaration of Victoria S. Matthews, ¶ 4.

release was part of a general reduction in personnel levels. Under these circumstances, the decision to release the plaintiff was committed to the sound discretion of the Secretary. See Memorandum Opinion at 5. Moreover, the declarations submitted by defendants indicate that plaintiff's qualifications and record were not of such unusual strength to merit retaining plaintiff in spite of his acknowledged homosexual tendencies. The Navy's decision to release plaintiff from active duty must therefore be upheld. Accordingly it is this 20th day of August, 1981

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed with prejudice.

Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JAMES M. WOODWARD, :

Plaintiff, :

v. : Civil Action

COMMANDER J.A. MOORE, : No. 76-1199

et al., :

Defendants. :

MEMORANDUM ORDER

Plaintiff has filed a motion for reconsideration of this Court's Memorandum Order and Judgment of August 20, 1981. In his motion, plaintiff raises two points: 1) that the August 20 Memorandum failed to address the constitutional question presented by this case; and 2) that the Memorandum misstated the scope of review to be applied in the nonconstitutional issue. After considering plaintiff's motion in light of the

entire record of this case, the Court concludes that the motion to reconsider should be denied.

For the proposition that it is unconstitutional to discharge a service-member for homosexual tendencies, the plaintiff relies upon a district court decision, benShalom v. Department of the Army, 489 F. Supp. 964 (E.D.Wis. 1980). Notwithstanding strong contrary authority from the Ninth Circuit, Beller v. Middendorf, 632 F.2d 812 (9th Cir. 1980)(Navy may constitutionally discharge those servicemen who engage in homosexual activity), plaintiff presses this Court to hold that the consideration of a reservist's admission of homosexual tendencies in a decision to release him from active service is constitutionally impermissible.

Plaintiff's contention that the Court has not addressed the constitutional issue in this case overlooks the Court's holding in its initial decision that "[t]he use of Woodward's admission of homosexual tendencies and his association with homosexuals as a basis for the exercise of that discretion [to release plaintiff from active duty] did not result in invidious discrimination in violation of due process, not in a violation of his right to freedom of association." For this proposition, the Court relied on the district court in Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977). The constitutional ruling in the Berg decision was not overturned by the Court of Appeals. Berg v. Claytor, 591 F.2d 849, 850 (D.C.Cir. 1978). Rather the Court of Appeals reversed and

remanded the case on a point of administrative law. Id. at 851. The constitutional holding of the district court in Berg therefore remains sound persuasive authority in this Court.

Moreover, the plaintiff overlooks the terms of the Court of Appeals order remanding this case. This case was remanded for reconsideration in light of the appellate decisions in Berg and Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C.Cir. 1978). As noted above, those decisions were based on principles of administrative, not constitutional law. This Court reexamined its decision in light of those cases, and determined that the case should be remanded to the service for a statement of reasons explaining why the Navy's retention policy on homosexuals had not

been applied to Woodward. Under the Court of Appeals decisions in Berg and Matlovich there was no reason to reconsider this Court's initial ruling on the constitutional point. The Court will not do so now.

Plaintiff's second point appears to be that this Court failed to apply the proper standard of review in examining the decision to release plaintiff from active duty. The Court rejects this contention as well. On the basis of the declarations submitted by the defendants, the Court found that plaintiff had been released from active service as part of a general reduction in manpower following the Vietnam war. Such decisions are committed to the discretion of the Secretary. The Secretary also has the discretion to set minimum perform-

ance standards by which to determine who shall be retained. The declarations establish that the Navy conducted a general review of reserve officers and graded them according to their records. Plaintiff's admitted homosexual tendencies were considered along with other factors in his sesrvice record, and the Navy determined that his record was not strong enough to merit retention.

Plaintiff appears to argue that by relying in part on plaintiff's admission of homosexual tendencies, the Navy was relying on an impermissible factor. This argument, however, assumes that plaintiff has prevailed, at least in part, on his constitutional claim. However, nothing in the Berg and Matlovich decisions, which control this case, forbids the Navy from considering

plaintiff's admission as a factor. Indeed, those decisions imply that the Navy could consider it, as long as the service provides its reasons for not applying the exception provided under its own regulations. This the Navy has done and plaintiff is entitled to nothing more. Accordingly, it is this 3rd day of September, 1981

ORDERED that plaintiff's motion for reconsideration is denied.

Barrington D. Parker
United States District Judge

NOT TO BE PUBLISHED -

SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 81-2017 September Term, 1981

James Mark Woodward Civl Action

v. No. 76-01199

Commander J.A. Moore, United States Navy, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WILKEY and WALD, Circuit Judges; and McGOWAN, Senior Circuit Judge

J U D G M E N T

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been

accorded full consideration by the court; they occasion no need for an opinion. See Local Rule 13(c).

ORDERED AND ADJUDGED, by this Court, that this case be remanded to the District Court for further proceedings, as called for in the accompanying memorandum.

Per Curiam
For the Court
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Woodward v. Moore No. 81-2017

MEMORANDUM

The Tucker Act, 28 U.S.C. § 1346 (1976), provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Court of Claims thus has exclusive jurisdiction over all claims exceeding $10,000. Id. § 1491.

The defendant contends that the district court lacked jurisdiction because the amount claimed by plain-

tiffs exceeds $10,000. The district court shall require the plaintiff to amend his complaint to plead the precise amount of back pay being sought, and shall then determine whether it has jurisdiction. If the plaintiff's claims exceed $10,000, the court shall transfer the case to the Court of Claims. If the plaintiff's claims are less than $10,000, the court shall reinstate its judgment or conduct whatever further proceedings it deems appropriate.

In determining the jurisdiction, the district court should be guided by the recent opinions of the court in Goble v. Marsh, Nos. 81-2151 and 81-2156 (9 July 1982), and Stone v. United States, No. 81-1943 (9 July 1982). These cases establish three things. First, "[p]laintiffs whose damages exceed

$10,000 may waive all claims greater than $10,000 in order to establish the jurisdiction of the District Court." Goble, slip op. at 2. Second, plaintiffs must waive not only amounts in excess of $10,000 accrued as of the time of filing, but also any additional accruals of back pay from the period of the filing of the complaint to entry of the judgment. Goble, slip op. at 8. Finally, a waiver of any net recovery in excess of $10,000 is sufficient to establish the district court's jurisdiction. Thus, a "plaintiff may remain in District Court under the Tucker Act if he limits his prayer for relief to a net monetary recover of $10,000 or less after deduction of civilian earnings and other amounts arising directly from the discharge." Stone, slip op. at 8-9.

The district court should give plaintiff an opportunity to amend his complaint to effect an adequate waiver. See Goble, slip op. at 10-11.

IN THE UNITED STATES CLAIMS COURT

No. 692-83C

(FILED MARCH 31, 1986)

JAMES MARK WOODWARD)	THIS OPINION WILL NOT BE PUBLISHED IN
v.)	THE U.S. CLAIMS
THE UNITED STATES)	COURT REPORTED BECAUSE IT DOES NOT ADD SIGNIFICANTLY TO THE BODY OF LAW AND IS NOT OF WIDESPREAD INTEREST.

Daniel M. Schember, Washington, D.C., attorney for the plaintiff.

John S. Groat, Washington, D.C., with whom was Assistant Attorney General Richard K. Willard, for the defendant, Donald J. Guter, Commander, JAGC, USN,

Office of the Judge Advocate General, Department of the Navy, of counsel.

OPINION

MARGOLIS, Judge.

The plaintiff, James Mark Woodward, brought this action seeking back pay and reinstatement after he was released from active duty in the United States Naval Reserve. He alleges that the Navy improperly and unconstitutionally removed him from active duty because of admitted homosexual tendencies.

This case was transferred here from the U.S. District Court for the District of Columbia when, after extended legal proceedings including two appeals, it was discovered that the District Court lacked jurisdiction because the amount in controversy in this military pay case

exceeded $10,000. See Woodward v. Moore, 451 F. Supp. 346 (D.D.C. 1978); Woodward v. Moore, No. 78-2062 (D.C. Cir. March 26, 1978); Woodward v. Moore, No. 76-1199 (D.D.C. August 20, 1981); Woodward v. Moore, No. 81-2017 (D.C. Cir. July 28, 1982).

The defendant United States now asserts that this court lacks jurisdiction to review the plaintiff's claim because a decision to release a reservist from active duty is left solely to the discretion of the Secretary of the Navy under 10 U.S.C. § 681(a) (1982). In the alternative, the defendant asserts that plaintiff was properly released based on his record, because of a general reduction in force in effect at the time, or because of his homosexuality.

The relevant facts are undisputed. Both parties, having completed discovery, have renewed their motions for summary judgment. The court concludes that it has jurisdiction to review plaintiff's claim and that the plaintiff's release was proper. The court grants the defendant's renewed motion for summary judgment and denies the plaintiff's motion.

FACTS

James M. Woodward was an Ensign on active duty with the U.S. Naval Reserve. When he enlisted for duty in June 1972, he completed a fitness questionnaire that asked whether or not he was attracted sexually to, or desired sexual activity with, members of his own sex, and whether or not he had ever engaged in homosexual conduct. He responded "yes"

to the first question and "no" to the second.

Navy regulation SECNAVINST 1900.9A (July 31, 1972), in effect at the time, mandated separation of homosexuals from the service. Homosexuality as defined by Navy regulation included "the expressed desire, tendency, or proclivity toward [homosexual] acts whether or not such acts are committed." SECNAVLIST 1900.9A ¶3. Despite the Navy's policy toward homosexuality and the affirmative answer on the questionnaire, Woodward was accepted for training in June 1972. Ensign Woodward successfully completed Navy flight school, his reports at this time indicating that he was a mediocre flyer, but that he had potential and was typically effective at his assignments. After

training, he eventually was assigned to Carrier Airborne Early Warning Squadron 116, a fleet operational squadron, destined for the Philippines.

While in the Philippines in 1974, Woodward visited the Subic Bay Officer's Club in the company of an enlisted man who was awaiting discharge from the service because of homosexuality. When Woodward's commanding officer, Commander J. A. Moore, questioned him about the incident, Woodward admitted his homosexual tendencies and stated that since he knew no "gay" officers he had sought the company of "gay" enlisted me. Woodward was asked to resign. He refused, and Commander Moore recommended his discharge.

The navy legal department was consulted about the recommended discharge,

but advised against it. The discharge was not processed, and pursuant to routine Navy practice, Woodward was instead made available for reassignment or release from active duty. The Navy regularly makes reservists available for reassignment or release when their commanding officer has recommended their discharge, but the discharge is not processed.

The file of a person made available for reassignment or release is reviewed by personnel officers who grade that person's performance records and recommend whether the Navy should reassign or release the individual. A grade of A or B is generally necessary to avoid release.

The review officers handling Woodward's case recommended him for

release, and he was released from active duty on October 22, 1974. Woodward was then reassigned to the Naval Air Reserve Staff H-1 in San Diego, California, where he served without pay in an inactive status. Afte releasing him from active duty, the Navy promoted him to Lieutenant, junior grade. On February 28, 1975, at Woodwrd's request, the Navy released him from further active reserve training. He twice failed to win promotion to the rank of Lieutenant, and the Navy discharged him after he completed his six-year term of service.

Woodward alleges that his release from active duty was procedurally improper in that he was entitled to an explanation of why he was denied the benefit of the Navy's policy of retaining some homosexuals while discharging

others. The defendant concedes that while the regulations apparently allowed no exceptions, the Navy did have a policy of retaining some officers despite their homosexuality. Woodward also alleges that his release violated the First and Fifth Amendments of the U.S. Constitution in that it resulted in his removal merely because of his thoughts, expressions and associations, and because it deprived him of employment without due process of law.

The defendant asserts that the personnel officers who reviewed Woodward's file based their decision on his record alone and that his performance resulted in his release from active duty. The defendant also asserts that this court lacks jurisdiction to review the action taken.

DISCUSSION

A. Jurisdiction

The court has considered the defendant's argument that it lacks jurisdiction to hear this case, but finds that argument unpersuasive. The nature of this claim fits squarely within the language of 28 U.S.C. § 1491.1/ The fact that a reservist is involved, as opposed to a member of the regular armed forces, may affect the result but does not interfere with this court's ability to hear the case. See Egan v. United

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1/ 28 U.S.C. § 1491(a)(1) states: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

States, 141 Ct.Cl. 1, 158 F.Supp. 377 (1958); Cf. Puglisi v. United States, 215 Ct.Cl. 86, 564 F.2d 402 (1977), cert. denied, 534 U.S. 968 (1978) (different treatment of reserve officers and regular officers was reasonable).

Defendant's argument is more properly couched in terms of the deference that should be accorded military decisions relating to personnel and, more particularly, this court's reluctance to substitute its judgment for that of the officers skilled in military evaluations. Guy v. United States, 221 Ct. Cl. 427, 433, 608 F.2d 867, 871 (1979); Cf. Rostker v. Goldberg, 453 U.S. 57 (1981) (deference due in military matters is greater than in most other areas). 10 U.S.C. § 681(a) vests the Secretary of the Navy with wide discre-

tion in determining when to release a reservist from active duty, but where a Secretary puts constraints upon that discretion by promulgating regulations, the court can review personnel actions for violations of these regulations.2/ Brooks v. United States, 209 Ct. Cl. 704, 705 (1976); Cf. Service v. Dulles, 354 U.S. 363 (1957). This court can also review employment decisions affecting military personnel for alleged violations of constitutional rights that give rise to monetary claims. See Koster v. United States, 231 Ct. Cl. 301, 308, 685 F.2d 407, 412 (1982).

B. Merits

2/ 10 U.S.C. § 681(a) provides: "Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

The first action affecting Woodward's employment was Commander Moore's decision to recommend him for discharge because he professed homosexual tendencies. Moore's authority to recomend the discharge cannot be seriously challenged. Such a decision is within his discretion. Moore's recommendation of discharge was not adopted, and Ensign Woodward, in accordance with regular Navy practice, was made available for retention or release.

Where an adverse personnel action has stemmed from alleged constitutionally protected conduct such as acknowledging homosexual tendencies, the defendant can avoid liability if it shows "by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's employ-

ment] even in the absence of the protected conduct." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977). The court finds that the defendant has met its burden of proof.

The defendant has introduced credible evidence by personnel officers who regularly review files that even without consideration of Woodward's homosexual tendencies, he would have been recommended for release at the time his record was reviewed. In other words, a Navy Ensign with a record similar to plaintiff's would have been released if his file had reached the reviewing office at the same time Woodward's file did. For example Captain Robert Goodloe testified that he would rank Woodward's record prior to acknowledgement of homosexual tendencies "below

average. . .bottom third, botton quarter, somewhere in that area." (Pltf.'s Br., App. 116). He also testified that given this record, he "would not have retained him" because he "consider[ed] his marks to be below the average." [Pltf.'s Br., App. 117).

Captain Robert Howard, another review officer, testified "[t]his guy didn't do very good [sic]. He's rated in the lower one-third." (Howard Dep. at 11). In her declaration, Lt. Commander Victoria S. Matthews, who reviewed Woodward's file and recommended his release from active duty, gave the following reasons:

> (a) Ensign Woodward acknowledged that he had a homosexual orientation and homosexual tendencies;
>
> (b) His fitness reports, which had been prepared by his commanding officer before his commanding officer was aware of Ensign Woodward's homosexuality, indi-

> cated that his peformance, although usually rated above average, was considered far from outstanding;
>
> (c) He compared unfavorably with the other reserve officers available for reassignment or release. Officers with fitness reports comparable to Ensign Woodward's usually received grades of C or D and his homosexuality resulted in further downgrading. I do not recall exactly where Ensign Woodward was ultimately ranked, but I do recall clearly that he was ranked far below the level at which reserve officers were being retained on active duty; and
>
> (d) The release of Ensign Woodward from active duty would appropriately implement Pers 432's requirement to reduce the number of reserve officers on active duty.

(Pltf.'s Br., App. 46-47).

Lt. Commander Matthews also stated in her declaration that <u>all</u> reserve officers who received a grade of C or D were released from active duty.

Plaintiff's statistical proof that only five Naval Reserve Flight Ensigns

were released in fiscal 1975 does not suggest that an Ensign with a record similar to the plaintiff's would not have been released, and therefore, does not overcome the defendant's evidence.

Plaintiff emphasizes that the review officers considered his homosexual tendencies during review and that this consideration improperly resulted in his release. Defendant acknowledges that the grades Woodward actually received during the review process included consideration of his homosexual tendencies and that this consideration may have resulted in even lower grades than he would have otherwise received. Nevertheless, sufficient evidence exists to conclude that Woodward's release would have occurred even without this downgrading. The court finds the testimony

of the review officers persuasive.

Since Woodward's release would have occurred at the time of review even without consideration of his homosexual tendencies, the constitutional issues raised by plaintiff need not be addressed by the court.

Also not reached by the court is the issue repeated from the earlier District Court proceedings--that plaintiff was at least entitled to an explanation of why he was denied the benefit of the Navy's discretionary policy of retaining some homosexuals. See Woodward v. Moore, supra; see also Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978).

Accordingly, the court grants the defendant's renewed motion for summary judgment and denies the plaintiff's motion. The clerk will dismiss the

complaint. No costs.

LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court

March 31, 1986

IN THE UNITED STATES CLAIMS COURT

No. 692-83 C

JAMES MARK WOODWARD

JUDGMENT

v.

THE UNITED STATES

Pursuant to the opinion of March 31, 1986, granting defendant's renewed motion for summary judgment and denying plaintiff's motion,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Frank T. Peartree

Clerk of Court

March 31, 1986 By:

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a).

Note: This Order has not been prepared for publication in a printed volume because it does not add signficantly to the body of law and it is not of widespread legal interest. It is a public record. It is not citable as precedent.

THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

86-1283

JAMES M. WOODWARD,

Appellant,

v.

THE UNITED STATES,

Appellee.

Before FRIEDMAN, SMITH and ARCHER, Circuit Judges.

O R D E R

A petition for rehearing having been

filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on May 9, 1989.

FOR THE COURT

May 2, 1989

Francis X. Gindhart

Clerk

cc: Daniel M. Schember

John S. Groat

United States Court of Appeals

for the Federal Circuit

86-1283

JAMES M. WOODWARD,

Appellant,

v.

THE UNITED STATES,

Appellee.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

Francis X. Gindhart

Clerk

Dated: May 12, 1989

cc: DANIEL M. SCHEMBER

JOHN S. GROAT

WOODWARD V US, 86-1283

(CLM-, 692-83 C)

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* Note: This order has not been
*
* prepared for publication in a
*
* reporter.
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Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-344

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES M. WOODWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
E. ROY HAWKENS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the United States Navy acted constitutionally when it released petitioner from active duty after he admitted that he was homosexual.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-344

JAMES M. WOODWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Claims Court (Pet. App. 96a-115a) is unreported. The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 871 F.2d 1068.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1989. A petition for rehearing was denied on May 2, 1989. Pet. App. 116a-117a. On July 21, 1989, Justice White extended the time for filing a petition for a writ of certiorari until August 30, 1989, and the petition was filed on that date. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1972, petitioner enlisted in the United States Naval Reserve and entered the Naval Flight Officer Candidate Program. At that time, he responded "yes" to a questionnaire that asked whether he was sexually attracted to men or whether he desired sex with men. He responded "no," however, to a question whether he had ever engaged in homosexual conduct. Pet. App. 2a. Although Navy regulations generally excluded homosexuals from military service (Pet. App. 2a n.1), the Naval Reserve allowed petitioner to enter its flight program.[1]

Petitioner completed flight school and was commissioned as an ensign in the Naval Reserve. In 1974, while serving in an air squadron stationed in the Philippines, petitioner went to the Subic Bay Officer's Club with an enlisted man who was awaiting discharge from the Navy for homosexual conduct. Pet. App. 3a. Because enlisted personnel were not authorized to use the club, petitioner and his

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[1] Prior to 1981, Navy regulations made "discharge of known homosexuals mandatory, subject only to a kind of [unreviewable] executive discretion vested in the Secretary which is unrelated to the fitness of any particular individual." *Beller* v. *Middendorf*, 632 F.2d 788, 802 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Homosexuality, as defined by pre-1981 regulations, included "the expressed desire, tendency, or proclivity toward [homosexual] acts whether or not such acts are committed." Pet. App. 2a n.1. Homosexual tendencies were considered to include any demonstrated "inclination, propensity, or proclivity to a participation in a homosexual act." Navy's Answers to Interrogatories at 3 (*Woodward* v. *Moore*, No. 76-1199 (D.D.C.)). In 1981, the Navy made homosexuality a non-waivable disqualification for military service. See Navy Military Personnel Manual 36-42; SECNAVINST No. 1920.6A, OP-130C3, at 2-3 (Nov. 21, 1983).

guest were asked to leave. When petitioner was later questioned by his commanding officer about the incident, he "admitted his homosexual tendencies and stated that since he knew no 'gay' officers he had sought the company of 'gay' enlisted men." *Ibid.*

Petitioner's commanding officer then asked him to resign. When petitioner declined, the commanding officer recommended to the Chief of Naval Personnel that petitioner be discharged under honorable conditions. Pet. App. 3a, 47a. In September 1974, petitioner submitted to the Chief of Naval Personnel a letter requesting that the Navy retain him even though he was homosexual. Petitioner wrote (Pet. App. 4a):

> I am, and have been, since I became sexually aware, primarily homosexually oriented. . . . I do, and will continue to, associate with other homosexuals.
>
> * * * *
>
> I am well aware of the problems of social acceptance and special problems of leadership with which I will be confronted as my associates become aware of my homosexuality.
>
> * * * *
>
> For the good of both the Navy and myself, I respectfully request the chance to contribute to the defense of the United States as an honest, open, "gay" officer. I recommend that the matter of my homosexuality be dropped as a matter of official concern.

The Navy did not then discharge petitioner. In accordance with standard Navy policy, however, the Navy reviewed whether petitioner should be reassigned or released from active duty. Pet. App. 5a, 102a. The Navy later determined that petitioner

should be released from active duty and assigned to a reserve position, concluding that (*id.* at 6a):

> [petitioner] had acknowledged his homosexuality; his fitness reports, which were prepared by [petitioner's] commanding officer prior to [petioner's] admission of homosexuality were "far from outstanding," leaving him uncompetitive with other reserve officers available for reassignment or release; and his release would appropriately implement the Navy policy (at that time) of reducing the number of reserve officers on active duty.

On October 22, 1974, the Navy released petitioner from active duty and assigned him to the Naval Air Reserve Staff in San Diego, California. *Ibid.* He served there until 1978, when the Navy discharged petitioner after he completed his six-year military obligation. *Id.* at 7a.

2. a. In June 1976, petitioner brought suit in the United States District Court for the District of Columbia and claimed that he had been unlawfully separated from active duty. He sought back pay and reinstatement to active duty in the Naval reserve. Pet. App. 7a. After lengthy litigation, including two appeals, petitioner's action was transferred to the Claims Court on the ground that the district court lacked jurisdiction under 28 U.S.C. 1346 because petitioner's back pay claim exceeded $10,000. Pet. App. 7a-8a.

In the Claims Court, petitioner challenged the lawfulness of his separation from active duty on two grounds. Pet. App. 97a. First, he contended that the Navy acted capriciously in failing adequately to explain the reason for his separation. Second, he contended that the Navy violated his rights under the

First and Fifth Amendments because it acted on the basis of his homosexuality.

The government argued that the decision to release a reservist from active duty is committed to the unreviewable discretion of the Secretary of the Navy.[2] Alternatively, the government argued that petitioner was permissibly released because of "his record, because of a general reduction in force in effect at the time, [and] because of his homosexuality." Pet. App. 98a.

b. The Claims Court rejected the government's argument that the Secretary's decision to release a reservist from active duty is not reviewable. Pet. App. 105a. The court acknowledged that 10 U.S.C. 681(a) confers "wide discretion" (Pet. App. 106a-107a) on the Secretary, and that the judiciary is obliged to accord deference to the Secretary's judgment regarding military personnel matters. Nevertheless, the court ruled that it had jurisdiction under the Tucker Act, 28 U.S.C. 1491,[3] to consider the merits of petitioner's claims. Pet. App. 107a.

The Claims Court assumed, without deciding, that petitioner's acknowledgement of homosexuality was constitutionally protected. It then reviewed the

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[2] The Navy relied on 10 U.S.C. 681(a), which provides: "Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

[3] Section 1491(a)(1) provides:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, * * * or for liquidated or unliquidated damages in cases not sounding in tort. * * *

Navy's decision to release petitioner from active duty under the causation guidelines outlined in *Mt. Healthy City School Dist. Bd of Educ.* v. *Doyle*, 429 U.S. 274 (1977). The court found that the Navy showed by a preponderance of the evidence that it would have reached the same decision without regard to the conduct claimed to be constitutionally protected, because petitioner's performance was below the level necessary for a reservist to be retained on active duty. Pet. App. 109a-113a. Thus the Claims Court granted the Navy's motion for summary judgment. *Id.* at 113a.[4]

3. The court of appeals affirmed the judgment on other grounds.[5] The court first found that the Claims Court's analysis under *Mt. Healthy* was flawed because it "fail[ed] to take into account that [petitioner's] file would not have reached the reviewing office [the Chief of Naval Personnel] at all had he not been homosexual and admitted it to his commanding officer." Pet. App. 23a. The Court noted: "Only because of his homosexuality was [petitioner's file] referred for review and it was, in part, the basis for his release from active duty." *Id.* at 25a.[6]

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[4] In light of the court's holding that the Navy would have separated petitioner from active duty even apart from his homosexuality, the court did not address petitioner's claim that he was entitled to an explanation of why he was denied the benefit of the Navy's pre-1981 discretionary policy of retaining some homosexuals. Pet. App. 113a.

[5] As a threshold matter, the court held, relying on *Webster* v. *Doe*, 108 S. Ct. 2047 (1988), that the Claims Court had jurisdiction over petitioner's claim for damages resulting from allegedly unconstitutional conduct.

[6] The court, however, rejected petitioner's contention that he should have been afforded the benefit of the Navy's pre-

In reviewing petitioner's constitutional claims, the court of appeals noted that a serviceman's "constitutional rights must be viewed in the light of the special circumstances and needs of the armed forces." Pet. App. 40a (quoting *Beller* v. *Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981)). The court of appeals observed that the judiciary is obliged to give the military "[s]pecial deference * * * when adjudicating matters involving * * * decisions on discipline, morale, composition and the like, and a court should not substitute its views for the 'considered professional judgment' of the military." Pet. App. 39a-40a (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986)). The court determined that those principles were particularly applicable here, because "the Secretary [in 10 U.S.C. 681(a)] was given extremely broad discretion by Congress to release a reserve officer from active duty at any time, and the applicable regulations do not in any way limit that discretion." Pet. App. 40a.

The court of appeals then rejected petitioner's contention that the Navy's action violated the First Amendment because it was based on petitioner's admission of homosexuality. The court wrote:

> [Petitioner] does not seriously contend on appeal that his statements are entitled to First Amendment protection. Because [petitioner's] state-

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1981 practice of retaining some homosexuals. The court stated: "[Petitioner] was not discharged for homosexuality; rather he was considered for reassignment, but because of his mediocre record as an officer *and* his homosexuality he was ultimately released from active duty pursuant to 10 U.S.C. § 681. Consequently, there is no inconsistency between [petitioner's] treatment and the Navy's [pre-1981] practice of considering some homosexuals for retention." Pet. App. 13a-14a n.3.

> ments were made "for personal reasons and not to inform the public of matters of general concern" they are not entitled to First Amendment protection. * * * "Mere publication does not clothe them with First Amendment protection."

Pet. App. 11a n.2.

The court of appeals next held that petitioner's separation from active duty did not violate the equal protection component of the Fifth Amendment.[7] First, the court ruled that the classification challenged by petitioner—a distinction based on homosexual "conduct or behavior" (Pet. App. 36a)—was not entitled to heightened judicial scrutiny. *Id.* at 33a-37a.[8] The court then held that the Navy's classification passed constitutional muster because it was rationally related to a permissible end:

> The Navy's policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the mainte-

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[7] The court of appeals also rejected the claim that the Navy violated petitioner's right to privacy. Pet. App. 25a-32a. Petitioner does not challenge that ruling.

[8] The court acknowledged (Pet. App. 26a n.6) that petitioner had not admitted engaging in homosexual acts. Nevertheless, the court noted that petitioner repeatedly admitted his homosexuality and "at various times stated that 'he was attracted sexually to, or desired sexual activity with, members of his own sex,' that 'since he knew no "gay" officers he sought the company of "gay" enlisted men,' [and] that he '[does], and will continue to, associate with other homosexuals,' * * *." *Ibid.* The court also noted that petitioner had declined to assert that he was celibate. *Ibid.* Under those circumstances, the court had little difficulty concluding that Navy's classification, as applied to petitioner, was "behavioral" in nature. *Id.* at 35a.

> nance of "discipline, good order and morale[,] . . . mutual trust and confidence among service members, . . . insur[ing] the integrity of the system of rank and command, . . . recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security." * * * We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving those legitimate interests. * * * The unique needs of the military, "a specialized society separate from civilian society," * * * justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission.

Pet. App. 38a-39a (quoting *Dronenburg* v. *Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984)). Accordingly, the court affirmed the judgment that the Navy acted lawfully in separating petitioner from active duty.

ARGUMENT

The decision of the court of appeals is correct. In addition, the decision does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

1. Petitioner first contends (Pet. 10-12) that the court of appeals erred in finding petitioner "guilty of criminal homosexual acts." *Id.* at 11. That contention is both misleading and without merit.

The court of appeals did not find that petitioner had engaged in homosexual sodomy, which is a crime under the Uniform Code of Military Justice. 10 U.S.C. 925. Rather, it ruled that the Navy's action was based on more than petitioner's expression of an abstract sexual preference—*i.e.*, that it had a behavioral component. See Pet. App. 26a n.6, 35a. The court of appeals' reading of the record was

amply supported. Petitioner's own statements showed that: (1) he was homosexual (*id.* at 4a), (2) he was sexually attracted to or desired sexual contact with other men (*id.* at 2a), (3) he sought out the company of homosexual men (*id.* at 3a), and (4) he had homosexual tendencies (*ibid.*). In addition, petitioner has, since 1972, declined to assert that he has refrained from homosexual conduct (*id.* at 26a n.6). Accordingly, the court of appeals' review of petitioner's constitutional claims was not premised on a faulty view of the facts.[9]

2. Petitioner next contends (Pet. 13-15) that the court of appeals had an inadequate record to resolve his equal-protection claim.[10] The court of appeals,

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[9] The Seventh Circuit's recent discussion in *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (1989), is instructive:

> It is true that actual [homosexual] conduct has not been admitted by plaintiff on any particular occasion, and the [military] has offered no evidence of such conduct. * * * Plaintiff's [homosexual] acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. * * * The [military] need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here.

[10] Petitioner apparently does not seek review of the court of appeals' decision not to apply strict scrutiny to the Navy's action. The court's refusal to accord heightened scrutiny to classifications based on homosexuality is consistent with the decisions of every court of appeals that has considered the issue.

however, correctly held (Pet. App. 38a) that the Navy's regulations regarding homosexuals were rationally related to a legitimate purpose.

The military has long and often explained the basis for its regulations regarding homosexuals. Over seven years ago, the Department of Defense issued a directive stating that the presence of homosexuals in the military will

> adversely affect[] the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of

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See *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (7th Cir. 1989); *Gay Veterans Ass'n, Inc.* v. *Secretary of Defense*, 850 F.2d 764 (D.C. Cir. 1988); *Padula* v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Baker* v. *Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Although a divided panel of the Ninth Circuit reached the opposite conclusion in *Watkins* v. *United States Army*, 847 F.2d 1329 (1988), that decision was vacated upon rehearing en banc in *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989). In this case, the court of appeals relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), to fortify its conclusion that the Navy's homosexual policy was not subject to strict scrutiny. In *Bowers*, this Court held that "the Federal Constitution [does not] confer[] a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190.

> military service; and to prevent breaches of security.

Department of Defense Directive (DOD) No. 1332.14, at 1-9 to 1-10 (Jan. 28, 1982). Accord Navy Military Personnel Manual 36-42.

The Ninth Circuit in *Beller* v. *Middledorf*, 632 F.2d 788 (1980), found those justifications to be sufficient to sustain as rational the Navy's regulations pertaining to homosexuals. It stated:

> The Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of the men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own. The Navy, moreover, could conclude rationally that toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval.
>
> * * * * *
>
> The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality;" undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on occasion be in confined situations for long periods.
>
> * * * Despite the evidence that attitudes towards homosexual conduct have changed among some groups in society, the Navy could con-

> clude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties. * * * [These] concerns expressed by the Navy might not apply in any particular case, but [they] do have some basis in fact. These considerations are adequate to sustain the regulation in its military context.

632 F.2d at 811-812.[11]

Contrary to petitioner's suggestion (Pet. 13-15), the Navy was not required to justify its regulations further by submitting factual affidavits or scientific studies. That is clear from this Court's decision in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), where the Court rejected the contention that the Air Force was required to submit empirical evidence to support the wisdom of its dress regulations. The Court in *Goldman* stated: "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.* at 509.

3. Lastly, petitioner errs in asserting (Pet. 15-17) that this case raises serious First Amendment

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[11] In light of those well-established and longstanding considerations underlying the Navy's regulations, petitioner clearly errs in contending (Pet. 15) that "[t]he Federal Circuit improperly decided [petitioner's constitutional] claim[s] in a vacuum, absent any evidence of interests served by the Navy's action."

concerns. The Navy separated petitioner from active duty because, among other things, he said that he was homosexual, he declared that he was attracted sexually or desired sexual activity with other men, and he sought out the company of homosexual enlisted men. Thus, the Navy reasonably concluded that petitioner was likely to commit homosexual acts—a practice that the Navy believes is detrimental to its military mission. The court of appeals correctly held (Pet. App. 11a-12a n.2), as has every court of appeals that has considered the issue,[12] that the military does not violate the First Amendment when it takes action against a servicemember who it reasonably believes has committed or is likely to commit homosexual acts.

The Navy's regulations plainly do not penalize servicemembers for engaging in protected First Amendment expression. As the Seventh Circuit noted in *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (1989), petitioner

> is free under the regulation to say anything [he] pleases *about* homosexuality and about the [Navy's] policy toward homosexuality. [He] is free to advocate that the [Navy] should change its stance; [he] is free to know and talk to homosexuals if [he] wishes. What [he] cannot do, and remain in the [Navy], is to declare [himself] to *be* a homosexual. Although that is, in

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[12] *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 458-462 (7th Cir. 1989); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). Accord *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376, 1383-1384 (9th Cir.), cert. denied, 454 U.S. 864 (1981).

> some sense speech, it is also an act of identification. And it is the identity that makes [him] ineligible for military service, not the speaking of it aloud.

Id. at 462.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
E. ROY HAWKENS
Attorneys

NOVEMBER 1989

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[13] Petitioner's non-constitutional claim (Pet. 17-18) is insubstantial. Petitioner incorrectly asserts (Pet. 18) that the "court failed to require the Navy to articulate its retention criteria and apply them to [petitioner's] case." The Navy's policy regarding service by homosexuals is a matter of record. See Pet. App. 2a n.1; note 1, *supra*. Moreover, as the court of appeals correctly found (Pet. App. 13a-14a n.3), there was no inconsistency between the Navy's treatment of petitioner and its pre-1981 practice of allowing some homosexuals to remain in the Navy.

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No. 89-344

In the

Supreme Court of the United States

October Term, 1989

JAMES M. WOODWARD,

Petitioner,

V.

UNITED STATES,

Respondent.

PETITIONER'S REPLY BRIEF

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1120 G Street, N.W.
Washington, D.C. 20005
202/393-5444

Counsel of Record for Petitioner

JOEL PAUL
Assistant Professor of Law
Washington College of Law
The American University

Of Counsel

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PETITIONER'S REPLY BRIEF

Review of the government's brief confirms both the errors of the court below and the importance of this case.

The government relies on Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), but a petition for writ of certiorari now has been filed in that case.[1] The Ben-Shalom and Woodward petitions should be considered together.[2] They raise similar questions but on different facts,[3] thus sharpening the issues before the Court. The Ben-Shalom opinion, moreover, conflicts

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1/ No. 89-876.

2/ We are informed the government does not oppose our request that consideration of the petition be deferred until consideration of Ben-Shalom's.

3/ See, Petition at 11, n.4, 13, n.5, n.8

significantly with the Federal Circuit's on both the First Amendment and equal protection issues.

On the First Amendment issue, the Seventh Circuit found Ben-Shalom's acknowledged desire to commit homosexual acts--not her speech or association--caused her exclusion from the Army. Here the Federal Circuit made no similar finding. Indeed, the Navy never has disputed that Ensign Woodward's release was caused by his speech and nonsexual association, not just his sexual orientation.[4/] The Seventh Circuit

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4/ Woodward's sexual orientation had been a matter of official record since his enlistment. Navy policy at the time allowed retention of some homosexuals, including those who had committed homosexual acts. Ensign Woodward was not released until he was seen associating with a gay servicemember, and thereafter spoke or wrote to his superiors, at his own initiative. The Navy's advice to

(footnote continued)

expressly acknowledged Ben-Shalom's First Amendment rights to speak on Army policy and associate with homosexuals. 881 F.2d at 462. The Federal Circuit, however, held Ensign Woodward's communications constitutionally unprotected and never addressed his association claim. See, Petition at 15-17.

In this Court, the government does not defend the Federal Circuit's holding on the speech issue. Like the Federal Circuit, however, it ignores Woodward's right of association. The government asserts Ensign Woodward's "behavior[]," not his "abstract" expression, is at

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4/ (footnote continued) the Board for Correction of Naval Records expressly asserted, moreover, that Ensign Woodward's association with a gay servicemember was a "sufficient basis" for his release, since it appeared to be a "public flaunting of his beliefs." Petition at 17.

issue. Opposition at 9. Yet the government overlooks that this "behavioral component" consisted entirely of association protected by the First Amendment. The only evidence of behavior by Ensign Woodward was his non-sexual association with a gay service-member and his statement that he "associate[d] with other homosexuals." Petition at 4.

On the equal protection question, the Federal Circuit's opinion also conflicts with Ben-Shalom.[5/] The Seventh Circuit said exclusion from the

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5/ Contrary to the government's Opposition, at 10, n.10, we maintain in this Court, as we did below, that the Navy's release of Ensign Woodward employed criteria deserving suspicion, that heightened scrutiny of this action therefore is warranted, and that the Navy's action should be accorded no presumption of validity. Petition at 14.

military for mere homosexual tendency or interest would be impermissible. 881 F.2d at 460, 462. Here, the Federal Circuit has held that, absent a "claim" of celibacy, persons who merely acknowledge homosexual orientation and associate nonsexually belong in the same class as those guilty of criminal homosexual acts.6/ The Federal Circuit's reasoning involves two unacceptable leaps of logic--first, that acknowledgement of homosexual orientation constitutes admission of sexual conduct, and, second, that the sexual conduct must have been criminal. The Federal Circuit's thinking is no more acceptable

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6/ On this point, moreover, the government distorts the record, saying Woodward "has, since 1972, declined to assert that he has refrained from homosexual conduct." Opposition, at 10. Woodward has not "declined"; the Navy never asked.

than inferring illegal fornication, adultery, and prostitution from acknowledgement of heterosexual orientation.7/

The government, to its credit, does not defend this reasoning by the Federal Circuit. But it erroneously asserts "the Navy reasonably concluded" Ensign Woodward "was likely to commit homosexual acts." Opposition at 14. The government cites nothing to support this assertion. Nothing in the record does so. This post hoc rationalization by the Solicitor General cannot be accepted. Burlington Truck Lines v.

7/ Contrary to the government's Opposition, at 9, Woodward does not assert the Court of Appeals found him guilty of criminal acts. Rather, the Court of Appeals presumed Woodward's guilt of such acts, for purposes of his equal protection claim, by placing him in a class defined by criminal conduct. Pet. App. 36a-37a.

United States, 371 U.S. 156, 168-169 (1962). See also, Petition at 13, n.5.8/ The Navy, furthermore, deliberately chose not to assert this rationalization below. It declined to respond to the District Court's order for "an explanation of the application of the Navy's retention policy regarding homosexuals to [Ensign Woodward]." Petition at 6. Instead, the Navy claimed an "independent basis" for Woodward's release. The Court of Appeals rejected the fallacious "independent basis" theory, and the government now has abandoned it.9/

8/ This rationalization, moreover, is undercut by the Navy's admission, Opposition at 15, n.13, that its "pre-1981" policy--applicable to Woodward--allowed retention of some homosexuals who had committed sexual acts.

9/ This has another important consequence. Given the Navy's refusal below to state the pre-1981 retention

(footnote continued)

The government improperly presents other new arguments in this Court. Attempting to cure the Navy's failure below to articulate any interests adversely affected by Ensign Woodward's acknowledgement of homosexual orientation and nonsexual association, the government now quotes a 1982 Defense Directive.[10] The Directive advanced two reasons for excluding gays from military service: (1) their presence offends others who hold prejudices against gays and (2) gays pose security risks. Opposition at 11-12. Neither

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[9] (footnote continued) criteria, and their application to Ensign Woodward, the government's abandonment in this Court of the "independent basis" theory means that Woodward's nonconstitutional claim now stands firmly established. See, Petition at 6, 17-18.

[10] Department of Defense Directive No. 1332.14 (Jan. 28, 1982).

reason was argued below.

Even if the Navy may present these reasons now, however, without remand for initial consideration by the lower courts, this Court still should grant the petition. The government's first reason sanctions private prejudice. It is incompatible with Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).11/

The government's second reason also is invalid. After the meeting at which Ensign Woodward acknowledged his sexual orientation, Navy officials allowed him

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11/ The government says Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), deemed servicemember prejudice a legitimate reason for exclusion of gays. Opposition at 12-13. Beller, however, concerned gays who had committed homosexual acts. Beller did not approve government sanction of private prejudice against persons merely because of their feelings, beliefs, expression, or association.

to retain his security clearance.[12] Further, since the filing of our petition, two members of Congress have released two reports commissioned by the Defense Department which were not previously available to the public.[13] After exhaustive study of military records, these reports concluded that gay men and women were suitable for military service and were not security

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12/ Plaintiff's Renewed Motion for Summary Judgment, filed in the Claims Court July 15, 1985, at App. 13.

13/ Defense Personnel Security Research and Education Center (Perserec), "Nonconforming Sexual Orientations and Military Suitability," Prepared by Theodore R. Sarbin, Ph.D. and Kenneth E. Karols, M.D., Ph.D., December 1988, (hereinafter, "Perserec 1988 Report"); "Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability," prepared by Michael A. McDaniel, (January 1989) (hereinafter, "Perserec 1989 Report").

risks.[14] The reports urged the

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[14] The 1988 Perserec Report found, at 25, that "the available data all point to the conclusion that preservice background characterization and subsequent job performance of homosexuals in the military is satisfactory (Williams and Weinberg, 1971; McDaniel, 1989; Zuliani, 1986; Crittenden Report, 1957)." Perserec also reviewed the 1957 Crittenden report--Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals, (Gibson, 1978)--and concluded, at 29, that "In the 30 years since the Crittenden report was submitted, no new data have been presented that would refute its conclusion that homosexuals are not greater security risks than heterosexuals." The Report reviewed studies of gay veterans and concluded that "Studies of homosexual veterans make clear that having a same-gender or opposite-gender orientation is unrelated to job performance in the same way as being left--or right--handed (Williams & Weinberg, 1971)." Id. at 33. The Report therefore concluded that gays should be treated as the military would treat other racial or ethnic minority groups.

The Perserec 1989 Report studied the suitability of gay men and women for security clearance and concluded, at

(footnote continued)

military to change its policy of excluding gays. The Department sought to suppress the studies.15/

CONCLUSION

The petition should be granted, the decision below reversed, and the case remanded for further proceedings.

Respectfully submitted,

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1120 G Street, N.W.
Suite 200
Washington, DC 20005

Counsel of Record for
Petitioner

14/ (footnote continued)
21, that "the preponderance of the evidence presented indicates that homosexuals show preservice suitability-related adjustment that is as good or better than the average heterosexual."

15/ Sciolino, Report Urging End of Homosexual Ban Rejected by Military, The New York Times, Oct. 22, 1989, at A1, col. 6.

JOEL PAUL
Assistant Professor of Law
Washington College of Law
The American University
4400 Massachusetts Ave. NW
Washington, DC 20015

Of Counsel

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